UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. ENRON CORP., et al., Defendants.	§	Civil Action No. H-01-3624 **(Consolidated)** CLASS ACTION

RESPONSE OF THE REGENTS OF THE UNIVERSITY OF CALIFORNIA TO "BRIEF OF *AMICUS CURIAE*" FILED BY STATE OF WISCONSIN INVESTMENT BOARD

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I. INTRODUCTION

Regents of the University of California, by counsel, hereby responds to the unauthorized "Brief of *Amicus Curiae*" filed by State of Wisconsin Investment Board ("SWIB") on or about January 28, 2002.[1] Without seeking leave of the Court, SWIB argues in its *amicus* brief that an entity's status as an institutional investor, alone, exempts a lead plaintiff movant from §21D's presumptive bar.[2]

There is no such blanket exemption for institutions under the PSLRA. No court has ever so held. Indeed, each court that has analyzed exemption from the "presumptive bar" of §21D has evaluated case-specific or "special circumstances" which might justify exemption. *See infra* at 3-4; Regents Opp. at 19-23; Regents Reply at 31-32. SWIB ignores the circumstances that counsel against lifting the presumptive bar here, namely that: (i) another lead plaintiff movant is well qualified to prosecute this action (*i.e.,* Regents); (ii) allowing the FSBA lead plaintiff status here would contradict the policies underlying the PSLRA because the FSBA's litigiousness frustrates effective monitoring; and (iii) there are significant threats to the FSBA's typicality and adequacy under Rule 23. (Indeed, more recent admissions to the press by those controlling the FSBA further confirm there are issues with FSBA's typicality and adequacy in this case. *See infra* at 5-8.) SWIB blithely ignores the facts of this case, stating "SWIB does not otherwise take a position on which of the applicants in this case should be selected as the most adequate plaintiff." SWIB Brf. at 8. But the facts which SWIB ignores are critical to the Court's determination of whether the presumptive bar should be lifted for the FSBA here.

The FSBA itself also ignores the circumstances here and misconstrues §21D by suggesting the "Restrictions on Professional Plaintiffs" provision counts only those "active" cases in which the FSBA serves as a lead plaintiff to determine application of the presumptive bar. ***First,*** §21D

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[1]SWIB is an institution that soon might be barred from serving as lead plaintiff by the "Restrictions on Professional Plaintiffs" provision of the PSLRA. (Although SWIB is not as litigious as the Florida State Board of Administration ("FSBA"), SWIB admits it has been a lead plaintiff in four securities class actions. SWIB Brf. at 7-8 & n.10.)

[2]Regents alternatively requests that the Court order that SWIB's *amicus* brief will not be considered by the Court because SWIB did not seek leave of Court to file and because SWIB's *amicus* brief does not provide relevant, non-repetitive information to the Court.

unambiguously does ***not*** so limit its application and there is not a shred of legislative history to support the new rule which the FSBA asks this Court to make. ***Second,*** the suggestion that certain of the FSBA's cases are not "currently active," FSBA Reply at 16-17, is dubious. *See infra* §II.B. And FSBA's suggestion that there are no issues concerning its adequacy here is belied by Judge Alsup's recent decision in *Critical Path*. *See infra* at 5-8.

In sum, SWIB asserts that this Court has very ***limited*** discretion in determining whether an institutional investor is barred from serving as a lead plaintiff, when in fact district courts, as Judge Whyte held in *McKesson*, have "considerable" discretion to do so. *See infra* §II.D. Allowing the FSBA to serve as lead plaintiff would contradict the purposes of the PSLRA under the circumstances of this case, and SWIB's attempt to limit this Court's assessment of those circumstances should be rejected.

II. ARGUMENT

A. §21D's "Restrictions on Professional Plaintiff" Provision Is Unambiguous and Its Legislative History Does Not Support the Specific Analysis SWIB and the FSBA Want to Inscribe Upon the Statute

SWIB suggests §21D's "Restriction on Professional Plaintiffs" provision cannot mean what it says. Despite the statute's clear text, they say Congress actually meant that for certain lead plaintiff movants, their status as an institutional investor, alone, exempts such a movant from §21D's presumptive bar. The FSBA further suggests that Congress meant to distinguish between the procedural posture of various cases and that §21D counts only those "active" cases in which the FSBA serves as a lead plaintiff to determine application of the presumptive bar. But Congress included no such limitations in §21D.

Section 21D unambiguously states "a person may be lead plaintiff ... in no more than 5 securities class actions ***brought ... during any 3-year period.***" 15 U.S.C. §78u-4(a)(3)(B)(vi) (emphasis added).

SWIB's attempt to contradict the PSLRA's unambiguous statutory text by resorting to legislative history should be rejected. Appeals to legislative history are well-taken only to resolve statutory ambiguity, *Barnhill v. Johnson*, 503 U.S. 393, 401 (1992), and here there is none.

"Legislative history is irrelevant to the interpretation of an unambiguous statute." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 808 n.3 (1989); *see also In re Kelly*, 841 F.2d 908, 912 (9th Cir. 1988). More important, statements in the legislative history "have never been regarded as sufficiently compelling to justify deviation from the plain language of a statute." *United States v. Oregon*, 366 U.S. 643, 648 (1961). Simply put, "legislative history – no matter how clear – can't override statutory text." *Hearn v. Western Conference of Teamsters Pension Trust Fund*, 68 F.3d 301, 304 (9th Cir. 1995). And here the legislative history does not, in any event, clearly support SWIB's contentions.

Moreover, when a statute is ambiguous, courts "first look to the conference report because, apart from the statute itself, it is the most reliable evidence of congressional intent." *See In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 977 (9th Cir. 1999). But here, the Conference Report merely confirms that a court "may need" to exempt an otherwise presumptively-barred professional plaintiff. *See* H.R. Conf. Rep. No. 104-369, at 35 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 734. Nowhere in the legislative history are institutions given a blanket exemption from the professional plaintiff bar, as SWIB claims.

Section §21D's "Restrictions on Professional Plaintiffs" is unambiguous. Even assuming it were ambiguous, there is no legislative history which could adequately resolve any ambiguity in favor of a blanket exemption for institutions or requiring the Court to distinguish between the procedural posture of various cases to count only those "active" cases in which the FSBA serves as a lead plaintiff to determine application of the presumptive bar.

B. This Court Has "Considerable Discretion" to Determine if Exemption from the "Presumptive Bar" Is Justified Under the Circumstances of the Case – Circumstances Which SWIB Ignores

SWIB argues that for certain lead plaintiff movants, their status as an institutional investor, alone, exempts such a movant from §21D's presumptive bar. To the exclusion of all other case-specific facts, SWIB claims that as long as the FSBA is an institutional investor willing and able to oversee and direct the litigation and retain competent counsel at a competitive rate, the presumptive bar of §21D does not apply to the FSBA. SWIB Brf. at 6. In other words, according to SWIB, this

Court has little or no discretion to determine application of §21D's presumptive bar when an institution is involved.

SWIB is wrong. As Judge Whyte stated in *McKesson* when he denied the FSBA's bid for lead plaintiff in favor of a lead plaintiff which had a loss of approximately $50 million, or just 30% of the FSBA's claimed damages, the "Restrictions on Professional Plaintiffs" provision of §21D "gives the court ***considerable discretion*** to bar repeat litigants, creating a rebuttable presumption that the same plaintiff should not direct more than five securities class actions in three years." *Aronson v. McKesson HBOC, Inc.*, 79 F. Supp. 2d 1146, 1156 (N.D. Cal. 1999).

Indeed, SWIB ignores the circumstances of this case, namely that: (i) another lead plaintiff movant is well qualified to prosecute this action (*i.e.,* Regents); (ii) allowing the FSBA lead plaintiff status here would contradict the PSLRA because the FSBA's litigiousness frustrates effective monitoring; and (iii) there are significant issues concerning the FSBA's typicality and adequacy under Rule 23, as most recently illustrated by FSBA's public statements noted herein. The rule which SWIB seeks to inscribe upon §21D would simply contradict the purposes of the PSLRA by frustrating effective monitoring, particularly when (as here) there is another qualified institution (Regents) with a large financial interest in the litigation which is not presumptively barred from serving as lead plaintiff.

Nor does the "Restrictions on Professional Plaintiffs" provision count only those "active" cases in which the FSBA serves as a lead plaintiff to determine application of the "presumptive bar." Section 21D unambiguously states "a person may be lead plaintiff ... in no more than 5 securities class actions ***brought ... during any 3-year period***." 15 U.S.C. §78u-4(a)(3)(B)(vi) (emphasis added).

Thus, ***first***, §21D unambiguously does ***not*** limit its application as the FSBA suggests and there is not a shred of legislative history to support the new rule which the FSBA asks this Court to make. ***Second***, the suggestion that certain of the FSBA's cases are not "currently active" is dubious. FSBA Reply at 16-17. As Regents has explained, the FSBA presently serves as lead plaintiff in at least nine securities class actions, is involved in 18 major securities class actions and six private securities actions, bringing the FSBA's active and current securities fraud cases to 24.

The FSBA erroneously suggests that two class actions the Regents states the FSBA is currently litigating as lead plaintiff "are settled or otherwise concluded," including *In re Dollar General Corp. Sec. Litig.*, No. 3:01-0388 (M.D. Tenn.) and *In re Critical Path, Inc. Sec. Litig.*, No. C 01-00551 WHA (N.D. Cal.). FSBA Reply at 16-17 nn.6, 27; January 29, 2002 Lettera Aff., ¶4. Indeed, the FSBA's "Quarterly Legal Activities Report," dated January 14, 2002, ***contradicts*** what the FSBA claims about the status of its litigation, as it lists *Critical Path* and *Dollar General* among 24 securities actions the FSBA calls "cases in which the SBA is ***actively involved***." Ex. 1, at 6.

In fact, *Dollar General* has not yet been approved for settlement by the court, and the action is likely to continue for months, if not years, even if a partial settlement were approved in the next few months.

And, in *Critical Path*, on January 17, 2002, Judge William H. Alsup entered an order ***denying*** the FSBA's request for preliminary settlement approval. *In re Critical Path, Inc. Sec. Litig.*, No. C 01-00551WHA, Order Declining Preliminary Approval of Class Settlement (N.D. Cal. Jan. 17, 2002) (Ex. 2). Judge Alsup's Order is significant here in that it supports Regents' contention that issues concerning the FSBA's adequacy under Rule 23 counsel against raising the presumptive bar for the FSBA in this case. In *Critical Path*, the FSBA attempted to settle claims on behalf of a class of Critical Path shareholders for $13.6 million, without taking any significant action to prosecute the case. This was a "low-end settlement," as Judge Alsup concluded, given (among other things), FSBA's "investigation" supported a maximum recovery of over $200 million. Order at 6-7. (Damages in *Critical Path* have been calculated by counsel for Regents to be as high as $892 million.)

In denying FSBA's request for preliminary approval of its proposed settlement, Judge Alsup found the FSBA and its counsel failed to prosecute the case:

> No depositions have been taken. No formal discovery has occurred. No class counsel interviews of defendants have occurred nor have defendants given statements....

Order at 4. Judge Alsup went on to identify numerous deficiencies in the FSBA's attempt to justify the "low-end settlement" the FSBA proposed:

> The main problem is that class counsel's investigation supports a maximum recovery of over $200 million (not counting the PeerLogic shares) and class counsel wishes to release it for only $13.6 million . . . . In justifying this large discount, class counsel cites, in conclusory fashion, "the risks of proving liability" (Decl. ¶ 16). ***How counsel can calibrate those "risks" when no depositions whatsoever have been taken is a mystery. The fact that the documents evidently show large fictitious sales inflating the fourth-quarter revenue – plus the admissions and extraordinary curative steps taken by the company itself after the fact – indicate that liability will not be an overly difficult issue.*** Also cited is the "complicated nature of proof of damages" (¶ 16). This conclusory phrase probably refers to the need to factor out extraneous market forces in tracing the portion of the stock plummet attributable to the actionable statements. For this, one would have expected the "retained economist" or counsel to supply a declaration explaining any difficulty. None was filed. So it is impossible to assess the extent to which this could justify a low-end settlement.

Order at 7 (emphasis added and in original).

Similar to the FSBA's apparent disregard of an important source of recovery for Enron's shareholders – insider trading proceeds – in *Critical Path*, Judge Alsup criticized the FSBA for disregarding the prospect of recovery from defendant officers and directors given the risk of bankruptcy of Critical Path:

> [N]o investigation whatsoever has been conducted to ascertain the net worth and ongoing income of the defendant officers and directors, at least insofar as this record shows. They are, after all, defendants. They must be expected to respond to any judgment based on any wrongdoing by them in the absence of adequate insurance. If insurance limits truly drove the settlement, then we need to know the extent of other plausible sources of recovery.

Order at 7. Here, the FSBA is speculating about another "low-end settlement": "I don't think anybody expects to recover a significant amount of money.... But if I get 10 cents on the dollar that's still $30 million." Jaconette Reply Decl., Ex. 20. As in *Critical Path*, such a settlement would not contemplate contribution from anything other than insurance proceeds.

Judge Alsup further criticized the FSBA as a lead plaintiff, noting that the FSBA had failed to supply a declaration explaining its "role in the negotiations" or why it "recommends the settlement." Order at 8. The FSBA, who was "supposed to direct the litigation for the class, submitted a declaration at the Court's request," but that declaration showed only "some settlement involvement" by the FSBA and indicated "FSBA did not attend the mediations." *Id.* As concluded by Judge Alsup, the declaration indicated the FSBA was "oblivious" to a critical allocation issue

before the Court, namely that 20% of the proposed settlement was going to claims brought in another lawsuit by shareholders of another company.

The FSBA attempts to downplay that its former relationship with Alliance poses significant threats to its typicality of claims and adequacy of representation under Rule 23, by stating it "has made it clear that no decisions" have been made to sue Alliance. FSBA Reply at 24. But the FSBA's recent public admissions are inconsistent with what it suggests. Several FSBA members, including Florida Governor Jeb Bush, Comptroller Bob Milligan, and Treasurer Tom Gallagher, "agreed" that Alliance must be pursued quickly. "'We believe Alliance is probably the one we should be going after ***first*** – everybody else is going after Enron and Arthur Andersen.'" *See* Ex. 3 (emphasis added). As stated at a recent Florida State Cabinet meeting by Tom Herndon, Executive Director of the FSBA: "I think we've always held out the very distinct possibility that a step of that nature against Alliance would be not only appropriate but the correct thing to do." In response to Governor Jeb Bush's indication that Alliance should be pursued "legally," notwithstanding this action, Attorney General Bob Butterworth stated: "Everyone is going after Arthur Andersen and Enron but ***Alliance is one that actually caused us our biggest damage*** and you're right Governor, ***we cannot let them walk***."[3] (Emphasis added.)

Attorney General Butterworth's statement that "***Alliance is the one that actually caused us our biggest damage***" is precisely the evidence that defendants' counsel in this case would use to try to break the chain of causation between defendants' false statements and the FSBA's losses (and the class' losses if the FSBA is lead plaintiff), and likewise rebut the presumption of reliance. And his statement that "***we cannot let them walk***" underlines the fact that the FSBA is going to be involved in a massive litigation against Alliance, which he believes is "the one" that the FSBA "should be going after ***first***." In other words, Alliance is the FSBA's "first" priority, ***not*** the claims of "everybody else" – in fact, the class.

Further undermining SWIB's argument that the presumptive bar should not be applicable to the FSBA is the fact that the FSBA's public statements are already providing fodder for defense

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[3]Florida State Cabinet Meeting, January 29, 2002, available at <http://www.dos.state.fl.us/cabinet/>.

counsel. Notwithstanding these statements and others which illustrate the obvious typicality issues which FSBA faces, the FSBA says there is a "complete absence" of proof concerning the Alliance issue. FSBA Reply at 22.[4] As a spokesperson for the FSBA has stated, "[w]e had a fair amount of discussions with Alliance about what was happening with our Enron shares .... There were plenty of red flags and we would talk about them. But Alliance ignored the red flags ...." Ex. 4. *See also* Ex. 5.

III. CONCLUSION

For all the reasons set forth herein, allowing the FSBA to serve as lead plaintiff would contradict the purposes of the PSLRA under the circumstances of this case and SWIB's attempt to limit this Court's discretion in applying the presumptive bar of §21D should be rejected.

DATED: February 1, 2002

Respectfully submitted,

SCHWARTZ, JUNELL, CAMPBELL
& OATHOUT, LLP
ROGER B. GREENBERG
Federal I.D. No. 3932
State Bar No. 08390000

ROGER B. GREENBERG

Two Houston Center
909 Fannin, Suite 2000
Houston, TX 77010
Telephone: 713/752-0017

[4]Even given this obvious typicality issue raised by the Alliance scenario, FSBA claims that as a matter of law, FSBA's additional claim against Alliance does not defeat reliance in the context of a fraud-on-the-marketcase. But the Eleventh Circuit case which FSBA cites for this proposition is ***not*** a fraud-on-the-marketcase as here. In *Ross v. Bank South, N.A.*, 837 F.2d 980, 997-98 (11th Cir.), *vacated on other grounds*, 848 F.2d 1132 (1988), the plaintiff brought "fraud-***created***-the-market," or "Shores" claims, not fraud-on-the-marketclaims. As the Eleventh Circuit explained, the "rebuttal of this presumption [of reliance] is more difficult under Shores than under Blackie," which is the seminal case discussing the presumption of reliance for fraud-on-the-marketclaims. 848 F.2d at 995 (citing *Blackie v. Barrack*, 524 F.2d 891, 906 (9th Cir. 1975)). Accordingly, the reasoning of *Ross* is inapplicable here.

HOEFFNER, BILEK & EIDMAN, L.L.P.
THOMAS E. BILEK
Federal Bar No. 9338
State Bar No. 02313525
440 Louisiana, Suite 720
Houston, TX 77002
Telephone: 713/227-7720

Attorneys in Charge

Of Counsel:

MILBERG WEISS BERSHAD
HYNES & LERACH LLP
STEVEN G. SCHULMAN
SAMUEL H. RUDMAN
One Pennsylvania Plaza
New York, NY 10119-1065
Telephone: 212/594-5300

MILBERG WEISS BERSHAD
HYNES & LERACH LLP
WILLIAM S. LERACH
DARREN J. ROBBINS
HELEN J. HODGES
BYRON S. GEORGIOU
G. PAUL HOWES
JAMES I. JACONETTE
JOHN A. LOWTHER
ALEXANDRA S. BERNAY
401 B Street, Suite 1700
San Diego, CA 92101
Telephone: 619/231-1058

::ODMA\WORLDOX\P:\DOCS\RGREEN\00036301.WPD

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DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interest in the within action; that declarant's business address is 401 B Street, Suite 1700, San Diego, California 92101.

2. That on February 1, 2002, declarant served the RESPONSE OF THE REGENTS OF THE UNIVERSITY OF CALIFORNIA TO "BRIEF OF *AMICUS CURIAE*" FILED BY STATE OF WISCONSIN INVESTMENT BOARD by depositing a true copy thereof in a United States mailbox at San Diego, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 1st day of February, 2002, at San Diego, California.

Debbie Granger

DEBBIE GRANGER

ENRON (S.D. TEXAS/LEAD)
Service List - 02/01/02
Page 1

COUNSEL FOR PLAINTIFF(S)

Stuart L. Berman *
SCHIFFRIN & BARROWAY, LLP
Three Bala Plaza East, Suite 400
Bala Cynwyd, PA 19004
610/667-7706
610/667-7056 (fax)

Kenneth A. Elan
LAW OFFICES OF KENNETH A. ELAN
217 Broadway, Suite 404
New York, NY 10007
212/619-0261
212/385-2707 (fax)

David B. Kahn
Mark E. King
Elissa C. Chase
DAVID B. KAHN & ASSOCIATES, LTD.
One Northfield Plaza, Suite 100
Northfield, IL 60093-1211
847/501-5083
847/501-5086 (fax)

Alfred G. Yates, Jr.
LAW OFFICES OF ALFRED G. YATES, JR.
519 Allegheny Building
429 Forbes Avenue
Pittsburgh, PA 15219
412/391-5164
412/471-1033 (fax)

Marc H. Edelson
HOFFMAN & EDELSON
45 W. Court Street
Doylestown, PA 18901
215/230-8043
215/230-8735 (fax)

Ann D. White
Jayne Goldstein
MAGER & WHITE
261 Old York Road, Suite 810
Jenkintown, PA 19046
215/481-0273
215/481-0271 (fax)

Christopher Lovell *
Robert Rodriguez
LOVELL & STEWART, LLP
500 Fifth Avenue, Suite 5800
New York, NY 10110
212/608-1900
212/719-4677 (fax)

Klari Neuwelt
LAW OFFICE OF KLARI NEUWELT
110 East 59th Street, 29th Floor
New York, NY 10022
212/593-8800
212/593-9131 (fax)

Peter D. Fischbein
LAW OFFICES OF PETER D. FISCHBEIN
777 Terrace Avenue, 5th Floor
Hasbrouck Heights, NJ 07604
201/288-8220
201/288-8208 (fax)

Michael Egan
BERNSTEIN LIEBHARD & LIFSHITZ, LLP
10 East 40th Street
New York, NY 10016
212/779-1414
212/779-3218 (fax)

Martin Chitwood *
CHITWOOD & HARLEY
2900 Promenade II
1230 Peachtree Street, N.E.
Atlanta, GA 30309
404/873-3900
404/876-4476 (fax)

Michael J. Pucillo *
BERMAN DEVALERIO PEASE TABACCO BURT & PUCILLO
515 North Flagler Drive
Suite 1701
West Palm Beach, FL 33401
561/835-9400
561/835-0322 (fax)

COUNSEL FOR PLAINTIFF(S)

Michael J. Behn *
FUTTERMAN & HOWARD, CHTD.
122 S. Michigan Avenue
Suite 1850
Chicago, IL 60603
312/427-3600
312/427-1850 (fax)

Harold B. Obstfeld, P.C.
HAROLD B. OBSTFELD, P.C.
260 Madison Avenue, 19th Floor
New York, NY 10016
212/696-1212
212/679-8998 (fax)

Paul A. Scarlato
WEINSTEIN KITCHENOFF SCARLATO
& GOLDMAN LTD.
1845 Walnut Street, Suite 1100
Philadelphia, PA 19103
215/545-7200
215/545-6535 (fax)

James D. Baskin III
BASKIN LAW FIRM
919 Congress Avenue, Suite 1000
Austin, TX 78701
512/381-6300
512/322-9280 (fax)

George M. Fleming
G. Sean Jez
FLEMING & ASSOCIATES, L.L.P.
1330 Post Oak Blvd., Suite 3030
Houston, TX 77056-3019
713/621-7944
713/621-9638 (fax)

Andrew M. Schatz
SCHATZ & NOBEL
330 Main Street
Hartford, CT 06106
860/493-6292
860/493-6290 (fax)

John G. Emerson, Jr. *
THE EMERSON FIRM
830 Apollo Lane
Houston, TX 77058
281/488-8854
281/488-8867 (fax)

Joe R. Whatley, Jr.
Peter H. Burke
WHATLEY DRAKE, LLC
2323 Second Avenue North
Birmingham, AL 35202-0647
205/328-9576
205/328-9669 (fax)

Michael D. Donovan
DONOVAN SEARLES, LLC
1845 Walnut Street, Suite 1100
Philadelphia, PA 19103
215/732-6067
215/732-8060 (fax)

Leo W. Desmond
LAW OFFICES OF LEO W. DESMOND
2161 Palm Beach Lake Blvd.
Suite 204
West Palm Beach, FL 33409
561/712-8000
561/712-8002 (fax)

David R. Scott *
Neil Rothstein
James E. Miller
SCOTT & SCOTT, LLC
108 Norwich Avenue
Colchester, CT 06415
860/537-3818
860/537-4432 (fax)

Marc S. Henzel
LAW OFFICES OF MARC S. HENZEL
273 Montgomery Avenue, Suite 202
Bala Cynwyd, PA 19004
610/660-8000
610/660-8080 (fax)

COUNSEL FOR PLAINTIFF(S)

Sid Liebesman *
GRANT & EISENHOFER, P.A.
1220 North Market Street
Suite 500
Wilmington, DE 19801
302/622-7000
302/622-7100 (fax)

Thomas E. Bilek *
HOEFFNER, BILEK & EIDMAN, L.L.P.
440 Louisiana, Suite 720
Houston, TX 77002
713/227-7720
713/227-9404 (fax)

Attorney of Record
BEATIE AND OSBORN LLP
521 Fifth Avenue, 34th Floor
New York, NY 10175
212/888-9000
212/888-9664 (fax)

Hector Gancedo
GANCEDO & NIEVES LLP
119 E. Union Street, Suite G
Pasadena, CA 91103
626/685-9800
626/685-9808 (fax)

Vincent Cappucci *
ENTWISTLE & CAPPUCCI LLP
299 Park Avenue, 14th Floor
New York, NY 10171
212/894-7200
212/894-7272 (fax)

Paul J. Geller *
CAULEY, GELLER, BOWMAN & COATES, LLP
2255 Glades Road, Suite 421A
Boca Raton, FL 33431
561/750-3000
561/750-3364 (fax)

Francis J. Farina
LAW OFFICES OF FRANCIS J. FARINA
577 Gregory Lane
Devon, PA 19333
610/695-9007
610/695-9023 (fax)

Peter A. Lennon
LAW OFFICE OF PETER A. LENNON
B-8 2200 Westchester Pike
Broomall, PA 19008
610/325-5220
610/325-5221 (fax)

Theodore C. Anderson
KILGORE & KILGORE PLLC
3131 McKinney Avenue, LB-103
Dallas, TX 75204-2471
214/969-9099
214/953-0133 (fax)

Peter D. Bull
Joshua M. Lifshitz
BULL & LIFSHITZ LLP
18 E. 41st Street
New York, NY 10017
212/213-6222
212/213-9405 (fax)

Tom A. Cunningham *
Richard J. Zook
John E. Chapoton, Jr.
CUNNINGHAM, DARLOW, ZOOK & CHAPOTON LLP
Chase Tower, 600 Travis
Suite 1700
Houston, TX 77002
713/255-5500
713/659-4466 (fax)

Evan J. Smith
Jason L. Brodsky
BRODSKY & SMITH, LLC
11 Bala Avenue, Suite 39
Bala Cynwyd, PA 19004
610/668-7987
610/660-0450 (fax)

COUNSEL FOR PLAINTIFF(S)

Anthony Bolognese
Joshua H. Grabar
BOLOGNESE & ASSOCIATES, LLC
One Penn Center Plaza
1617 JFK Blvd., Suite 650
Philadelphia, PA 19103
215/814-6750
215/814-6764 (fax)

William B. Federman *
FEDERMAN & SHERWOOD
120 N. Robinson, Suite 2720
Oklahoma City, OK 73102
405/235-1560
405/239-2112 (fax)

Roger B. Greenberg *
SCHWARTZ, JUNELL, CAMPBELL & OATHOUT, LLP
Two Houston Center
909 Fannin, Suite 2000
Houston, TX 77010
713/752-0017
713/752-0327 (fax)

Damon Young *
Lance Lee
YOUNG PICKETT & LEE
4122 Texas Blvd.
Texarkana, TX 77503
870/774-3206
903/792-5098 (fax)

Fred E. Stoops, Sr.
RICHARDSON, STOOPS, RICHARDSON & WARD
6555 South Lewis Avenue
Suite 200
Tulsa, OK 74136-1010
918/492-7674
918/493-1925 (fax)

Richard M. Frankel
HACKERMAN FRANKEL & MANELA
1122 Bissonnet
Houston, TX 77005
713/528-2500
713/528-2509 (fax)

James V. Pianelli *
Timothy D. Riley
MCGEHEE & PIANELLI, LLP
1225 North Loop West, Suite 810
Houston, TX 77008
713/864-4000
713/868-9393 (fax)

Thomas W. Sankey *
SANKEY & LUCK, LLP
600 Travis Street, Suite 6200
Houston, TX 77002
713/224-1007
713/223-7737 (fax)

Louis F. Burke
LOUIS F. BURKE, P.C.
360 Lexington Avenue
New York, NY 10017
212/682-1700
212/808-4280 (fax)

Paul T. Warner
LAW OFFICE OF PAUL T. WARNER
4265 San Felipe, Suite 1000
Houston, TX 77027
713/622-7271
713/623-8724 (fax)

Charles R. Parker *
HILL, PARKER & ROBERSON LLP
5300 Memorial Drive, Suite 700
Houston, TX 70007
713/868-5581
713/868-1275 (fax)

Joseph A. McDermott, III *
LAW OFFICE OF JOSEPH A. MCDERMOTT, III
3100 Richmond Avenue, Suite 403
Houston, TX 77098
713/527-9190
713/527-9633 (fax)

COUNSEL FOR PLAINTIFF(S)

Sean F. Greenwood
ROBINS, CLOUD, GREENWOOD & LUBEL, LLP
910 Travis, Suite 2020
Houston, TX 77002
713/650-1200
713/650-1400 (fax)

R. Paul Yetter *
YETTER & WARDEN, LLP
600 Travis, Suite 3800
Houston, TX 77002
713/238-2000
713/238-2002 (fax)

Martin D. Beirne *
BEIRNE, MAYNARD & PARSONS
Allied Bank Tower, 24th Floor
1300 Post Oak Blvd.
Houston, TX 77056
713/623-0887
713/960-1527 (fax)

Michael D. Sydow
VERNER, LIIPFERT, BERNHARD, MCPHERSON & HAND
111 Bagby, Suite 4700
Houston, TX 77002
713/225-7200
713/654-8186 (fax)

Robert N. Rapp *
CALFEE, HALTER & GRISWOLD LLP
1650 Fifth Third Center
21 E. State Street
Columbus, OH 43215
216/622-8200
216/241-0816 (fax)

Earnest Wotring *
CONNELLY BAKER WROTRIGHT & JACKSON, LLP
700 Louisiana Street, Suite 1850
Houston, TX 77002
713/980-1700
713/980-1733 (fax)

Sam Merovitz
MEROVITZ & CEDAR, LLP
1234 Market Street, Suite 2040
Philadelphia, PA 19107
215/546-6222
215/563-4073 (fax)

Oren Giskan
PRONGAY & BORDERUD
207 W. 25th Street, 4th Floor
New York, NY 10001
212/475-0099
212/473-8096 (fax)

Mazyar Hedayat
LAW OFFICES OF MAZYAR HEDAYAT
410 S. Michigan Avenue
Suite 310
Chicago, IL 60605
312/322-0955
312/322-0575 (fax)

Ronald J. Kormanik *
SYDOW, KORMANIK & ECKERSON
1111 Bagby, Suite 4700
Houston, TX 77002
713/654-8100
713/752-2199 (fax)

Richard J. Plezia
ABRAHAM, WATKINS, NICHOLS, SORRELS, MATTHEWS & FRIEND
800 Commerce Street
Houston, TX 77002
713/222-7211
713/225-0827 (fax)

Jack A. Meyerson
LAW OFFICES OF JACK MEYERSON
1700 Market Street, Suite 2632
Philadelphia, PA 19103
215/972-1376
215/972-0277 (fax)

COUNSEL FOR PLAINTIFF(S)

William S. Lerach
Helen J. Hodges
Byron S. Georgiou
MILBERG WEISS BERSHAD HYNES & LERACH LLP
401 B Street, Suite 1700
San Diego, CA 92101-5050
619/231-1058
619/231-7423 (fax)

Melvyn I. Weiss *
Steven G. Schulman
Samuel H. Rudman
MILBERG WEISS BERSHAD HYNES & LERACH LLP
One Pennsylvania Plaza
New York, NY 10119-0165
212/594-5300
212/868-1229 (fax)

Jules Brody
Aaron Brody
Tzivia Brody
STULL, STULL & BRODY
6 East 45th Street, 4th Floor
New York, NY 10017
212/687-7230
212/490-2022 (fax)

Steven J. Toll
Andrew N. Friedman
COHEN, MILSTEIN, HAUSFELD & TOLL, P.L.L.C.
1100 New York Ave., N.W.
Suite 500
Washington, DC 20005-3964
202/408-4600
202/408-4699 (fax)

Jeffrey C. Block *
BERMAN DEVALERIO PEASE TABACCO BURT & PUCILLO
One Liberty Square
Boston, MA 02109
617/542-8300
617/542-1194 (fax)

Solomon B. Cera *
Steven O. Sidener
Joseph M. Barton
GOLD BENNETT CERA & SIDENER LLP
595 Market Street, Suite 2300
San Francisco, CA 94105
415/777-2230
415/777-5189 (fax)

Jonathan M. Plasse
Ira A. Schochet
David J. Goldsmith
GOODKIND LABATON RUDOFF & SUCHAROW, LLP
100 Park Avenue, 12th Floor
New York, NY 10017-5563
212/907-0700
212/818-0477 (fax)

Deborah R. Gross
LAW OFFICES OF BERNARD M. GROSS, P.C.
1515 Locust Street, 2nd Floor
Philadelphia, PA 19102
215/561-3600
215/561-3000 (fax)

Frederic S. Fox
KAPLAN FOX & KILSHEIMER LLP
805 Third Avenue, 22nd Floor
New York, NY 10022
212/687-1980
212/687-7714 (fax)

Robert M. Roseman
Jay S. Cohen
SPECTOR, ROSEMAN & KODROFF, P.C.
1818 Market Street, Suite 2500
Philadelphia, PA 19103
215/496-0300
215/496-6611 (fax)

COUNSEL FOR PLAINTIFF(S)

Robert I. Harwood
Frederick W. Gerkens
Thomas J. Harrison
WECHSLER HARWOOD HALEBIAN & FEFFER LLP
488 Madison Avenue, 8th Floor
New York, NY 10022
212/935-7400
212/753-3630 (fax)

Daniel W. Krasner *
Jeffrey G. Smith
WOLF HALDENSTEIN ADLER FREEMAN & HERZ, LLP
270 Madison Avenue
New York, NY 10016
212/545-4600
212/545-4653 (fax)

Sherrie R. Savett *
Carole A. Broderick
Arthur Stock
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
215/875-3000
215/875-3053 (fax)

David Jaroslawicz
JAROSLAWICZ & JAROS
150 William Street, 19th Floor
New York, NY 10038
212/227-2780
212/732-6746 (fax)

Neil L. Selinger *
LOWEY DANNENBERG BEMPORAD & SELINGER, P.C.
The Gateway, One N. Lexington Ave.
White Plains, NY 10601
914/997-0500
914/997-0035 (fax)

James A. Harrod *
WOLF POPPER LLP
845 Third Avenue
New York, NY 10022
212/759-4600
212/486-2093 (fax)

Joseph H. Weiss
WEISS & YOURMAN
551 Fifth Avenue, Suite 1600
New York, NY 10176
212/682-3025
212/682-3010 (fax)

Saul Roffe
SIROTA & SIROTA
110 Wall Street, 21st Floor
New York, NY 10005
212/425-9055
212/425-9093 (fax)

Curtis V. Trinko
LAW OFFICES OF CURTIS V. TRINKO LLP
16 West 46th Street
Seventh Floor
New York, NY 10036
212/490-9550
212/986-0158 (fax)

Jeffrey C. Zwerling *
Richard A. Speirs
ZWERLING, SCHACHTER & ZWERLING, LLP
767 Third Avenue
New York, NY 10017-2023
212/223-3900
212/371-5969 (fax)

COUNSEL FOR PLAINTIFF(S)

Ira M. Press *
KIRBY, MCINERNEY & SQUIRE, LLP
830 Third Avenue, 10th Floor
New York, NY 10022
212/371-6600
212/751-2540 (fax)

Thomas Shapiro *
SHAPIRO HABER & URMY, LLP
75 State Street
Boston, MA 02109
617/439-3939
617/439-0134 (fax)

Joseph Goldberg
FREEDMAN BOYD DANIELS
HOLLANDER GOLDBERG & CLINE P.A.
20 First Plaza, N.W., Suite 700
Albuquerque, NM 87102
505/842-9960
505/842-0761 (fax)

Joseph V. McBride
RABIN & PECKEL, LLP
275 Madison Avenue
New York, NY 10016
212/682-1818
212/682-1892 (fax)

Lionel Z. Glancy
GLANCY & BINKOW LLP
1801 Avenue of the Stars
Suite 311
Los Angeles, CA 90067
310/201-9150
310/201-9160 (fax)

Richard M. Heimann *
James M. Finberg
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
275 Battery Street, 30th Floor
San Francisco, CA 94111-3339
415/956-1000
415/956-1008 (fax)

Steve W. Berman
HAGENS BERMAN LLP
1301 Fifth Avenue, Suite 2900
Seattle, WA 98101
206/623-7292
206/623-0594 (fax)

COUNSEL FOR DEFENDANTS

Stephen Susman
SUSMAN GODFREY L.L.P.
1000 Louisiana Street
Suite 5100
Houston, TX 77002-5096
713/651-9366
713/653-7897 (fax)

James E. Coleman, Jr.
CARRINGTON, COLEMAN, SLOMAN & BLUMENTHAL
200 Crescent Court, Suite 1500
Dallas, TX 75201
214/855-3000
214/855-1333 (fax)

COUNSEL FOR DEFENDANTS

William F. Martson, Jr.
Zachary W.L. Wright
TONKON TORP LLP
1600 Pioneer Tower
888 S.W. Fifth Avenue
Portland, OR 97204-2099
503/802-2041
503/927-3741 (fax)

Bruce Hiler
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, DC 20004-1109
202/383-5300
202/383-5414 (fax)

Kathy D. Patrick
GIBBS & BRUNS, L.L.P.
1100 Louisiana, Suite 5300
Houston, TX 77002
713/650-8805
713/750-0903 (fax)

Eric Nichols
BECK, REDDEN & SECREST L.L.P.
One Houston Center
1221 McKinney Street, Suite 4500
Houston, TX 77010
713/951-3700
713/951-3720 (fax)

Charles F. Richards, Jr.
Of Counsel
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square, P.O. Box 551
Wilmington, DE 19899
302/658-6541
302/658-6548 (fax)

Richard B. Drubel
BOIES SCHILLER & FLEXNER LLP
26 South Main Street
Hanover, NH 03755
603/643-9090
603/643-9010 (fax)

J. Clifford Gunter III
Abigail K. Sullivan
BRACEWELL & PATTERSON, L.L.P.
South Tower Pennzoil Place
711 Louisiana Street, Suite 2900
Houston, TX 77002-2781
713/223-2900
713/221-1212 (fax)

Craig Smyser
SMYSER KAPLAN & VESELKA, L.L.P.
700 Louisiana Street, Suite 2300
Houston, TX 77002
713/221-2300
713/221-2320 (fax)

John J. McKetta III
Helen Currie Foster
GRAVES, DOUGHERTY, HEARON & MOODY, P.C.
515 Congress Avenue, Suite 2300
Austin, TX 78701
512/480-5600
512/478-1976 (fax)

Jack C. Nickens
Paul D. Flack
NICKENS, LAWLESS & FLACK, L.L.P.
1000 Louisiana, Suite 5360
Houston, TX 77002
713/571-9191
713/571-9652 (fax)

COUNSEL FOR DEFENDANTS

Jeffrey W. Kilduff
O'MELVENY & MYERS LLP
1650 Tysons Blvd.
McLean, VA 22102
703/287-2402
703/287-2404 (fax)

Ronald G. Woods
RONALD G. WOODS, ATTORNEY AT LAW
6300 Memorial, Suite 1000
Houston, TX 77007
713/842-9600
713/864-8738 (fax)

Rusty Hardin
RUSTY HARDIN & ASSOCIATES, P.C.
1201 Louisiana, Suite 3300
Houston, TX 77002
713/652-9000
713/652-9800 (fax)

Dr. Bonnee Linden
PRO SE
1226 West Broadway, P.O. Box 114
Hewlett, NY 11557
516/295-7906
516/295-1975 (fax)

Barry G. Flynn
ATTORNEY AT LAW
1300 Post Oak Blvd., Suite 750
Houston, TX 77056
713/840-7474
713/840-0311 (fax)

William R. McLucas
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, DC 20037-1420
202/663-6000
202/663-6363 (fax)

Michael P. Carroll
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, NY 10017
212/450-4000
212/450-4800 (fax)

* Denotes service via facsimile and UPS.

TO: Tom Herndon, Executive Director

FROM: Linda Lettera, General Counsel

SUBJECT: Quarterly Legal Activities Report

DATE: January 14, 2002

I. PENDING CONTRACT WORK

Contract Lists - the contract lists have been updated. A copy of the numerical and alphabetized listings of the contract files dated December 27, 2001, is located in the General Counsel's Office, if needed.

New Contracts - the following were entered into during this reporting period:

1.	Worsham Forsythe & Wooldridge	001-66
2.	Florida Water Pollution Control Financing Corp. (Administrative Services Contract)	001-67
3.	Trent Webster	001-68
4.	Investech Systems Consulting, Inc.	001-69
5.	Ketchum Inc.	001-70
6.	MacKay Shields, L.L.C.	001-71
7.	Hicks, Muse, Tate & Furst Equity Fund V, L.P.	001-72
8.	Diwan, Ernst & Young	001-73
9.	BRC, Inc.	001-74
10.	Fla. Hurricane Modeler Contracts	001-75(A-E)
11.	CitiStreet LLC	001-76
12.	RSA Security	001-77
13.	Ketchum, Inc.	001-78
14.	IKON	001-79
15.	Danka	001-80
16.	Rayburn, Jay	001-81
17.	Easy Rolling Paint Service Inc.	001-82

Amended Contracts

1.	State Street Bank & Trust Company	93-65
2.	ADP/Proxy Edge	96-24

3.	Ned Davis Research Group	00-05
4.	William M. Mercer, Inc.	001-13
5.	Ripplewood Partners II, L.P.	001-14
6.	Cost Effectiveness Measurement, Inc. (CEM)	001-26
7.	Deutsche Banc Alex. Brown Inc.	00-17
8.	Morgan Stanley	00-17(G)
9.	American Bank Note	95-03
10.	Stewart Brown	90-47
11.	Bowne of Atlanta	95-81
12.	Ennis, Knupp & Associates	98-46
13.	David L. Babson & Co., Inc.	98-52
14.	Moody's Investor s	001-37

II. PUBLIC RECORDS REQUESTS

Public Records Request by Computershare Analytics f/k/a Financial Data Concepts. On August 28, 2001, a public records request was received by Domestic Equities for both Domestic and International Equities. On October 3, 2001, Ray Petty complied with the request.

Metz, Hauser & Husband, P.A. On October 17, 2001, a request was received from the Metz Law Firm for all DC contractual documents relating to the relationship with CitiStreet, Ketchum, and Ernest & Young. We complied with the request on October 18, 2001.

SEIU Service Employees International Union. On October 29, 2001, a letter was received from Richard W. Clayton. III, a research analyst for the SEIU (Service Employees International Union) requesting documents relating to any Limited Partnership in which the Board has an equity interest, etc. On November 20, 2001, David Todd complied with the public records request.

Metz, Hauser & Husband On October 3, 2001, a public records request was received from the Metz Law Firm requesting documents relating to the 5 selected bundled providers. Cindy Gokel and Joan Lazar complied with the request on October 4, 2001.

Saul Ewing, LLP. On November 19, 2001, a public records request was received requesting copies of agreements and correspondence, etc. pertaining to Regulus Group LLC. On December 17, 2001, Ray Petty complied with the request.

III. DOMESTIC INVESTMENT PROGRAMS

Goldman Sachs Capital Markets, L.P. Swap Transaction. On March 26, 2001, Fixed Income requested this Office to work on a swap transaction arrangement with Goldman. It is anticipated that the arrangement will utilize a modified version of the ISDA form of Multicurrency-Cross Border agreement that has not been used before at the SBA. This

undertaking will require careful attention to certain clauses of the ISDA form, including those relating to tax issues and venue. Recent activity: the issue regarding the guaranty mentioned in the last quarterly report has now been resolved. The contract documents have been distributed for review.

IV. PUBLIC EMPLOYEE OPTIONAL RETIREMENT PLAN ("PEORP")/ DEFINED CONTRIBUTION PLAN

The tax rules for the PEORP were adopted on October 31, 2001. These rules were promulgated so that certain provisions of the Internal Revenue Code would be incorporated into the PEORP in order to satisfy a condition of issuance of the IRS determination letter that will determine the qualified status of the PEORP. The IRS agent who handled the intake states that the PEORP determination letter should be issued by the end of the month.

V. REAL ESTATE - Miscellaneous

Nyala Farms Corporate Center – the State Board is the owner of an office complex in Westport, Connecticut known as Nyala Farms Corporate Center. As part of the Board's customary due diligence, a private engineering firm was hired to undertake environmental and structural studies of the property. The Board engaged Law Engineering and Environmental, Inc. (Law) in this regard. The Law due diligence report noted no adverse matters and the property was acquired in December, 1998. In January 1999, significant adverse structural issues were first discovered regarding the concrete in the Center's parking garages. Initial estimates to correct the defective concrete problems ranged from $1.7M to $2M. After notice of the Board's claim was delivered to Law, a grossly inadequate settlement offer was received.
Written authorization from the trustees to commence suit was received effective as of May 1, 2001. The Board and Law entered a Tolling Agreement in July 2001, whereby the parties mutually agreed to stop the running of all applicable statutes of limitations pending ongoing settlement negotiations. Update: Attempts to settle were unsuccessful and suit was filed in the federal district court for the Northern District of Florida on October 2, 2001.

Sunshine Agriculture Incorporated and Goose Pond, Inc. – the Board's lead tax counsel has advised us that the California Franchise Tax Board will grant the Board's application for tax exempt status.

One Atlanta Plaza - favorable tax exemption determinations were received from the IRS and the State of Florida. However, the Georgia Department of Revenue has denied our application for refund of the transfer tax in the amount of $114,000 that was paid at the time of closing. The Board's lead counsel has provided a tax law memo analyzing a

possible challenge to Georgia's denial. Counsel will also provide a fee estimate to litigate the matter if Georgia will agree to a stipulated statement of facts.

VI. MISCELLANEOUS

JAPC INQUIRY - Administrative Rule Repeal & Review – The Joint Administrative Procedures Committee sent the SBA a letter on December 12, 2001, inquiring as to the status of three rules. Cindy Gokel discussed those rules, one of which was already being amended, with JAPC attorney John Rosner on December 20, 2001. JAPC's issues were satisfactorily resolved.

SEC No-Action Letter

Steve Boehm of Sutherland, Asbill and Brennan filed a request for a no-action letter on behalf of the SBA on October 11, 2001 (regarding whether certain non-FRS funds for which the SBA invests money would be permitted to purchase Rule 144A Securities). The SEC, however, now advises that due to change in administration, a response on this type of issue will not be forthcoming. Instead, we have been instructed to obtain a reasoned opinion of counsel.

Trent Webster – Visa and Green Card

Ray Petty has been working with Trent and outside counsel Everett Anderson to obtain Trent a green card. The SBA entered into an agreement with Everett Anderson to pay for a portion of the costs for the green card. The SBA is also assisting in the process of extending Trent' s H-1B Visa for three years while he obtains his green card.

Inland Protection Financing Corporation

On August 27, 2001, the Internal Revenue Service sent a Notice of Proposed Penalty to the Corporation. The I.R.S. is proposing a penalty in the amount of $2,900 for the tax year 1999, for incorrect taxpayer I.D. numbers for checks cut for reimbursements. The I.R.S. is challenging 59 of the taxpayer I.D. numbers, as being incorrect out of the 1,170 total checks cut for that year. The I.R.S. penalty notice and back-up material has been sent to Mike Sole at D.E.P. for a review and comparison of taxpayer I.D. numbers with D.E.P. records. The Corporation's response is due to be filed with the I.R.S. on October 11, 2001. Update: The review conducted by the Department of Environmental Protection (DEP) revealed that of the alleged 59 incorrect ID numbers, 27 were the fault of DEP. The Corporation sent its response to the IRS on October 10, 2001, requesting that penalty be abated except for $1350 representing incorrect numbers on the part of DEP.

VIII. GENERAL LITIGATION

Guangdong International Trust and Investment Corporation Bankruptcy. The SBA owns $15,000,000 of a bond due in 2016, paying 8 3/4% of the Guangdong International Trust and Investment Corporation ("GITIC"), a Chinese Corporation, which has defaulted on the last interest payment due, and has filed for bankruptcy under the Republic of China law. The SBA received the first payment as a Yankee bondholder creditor in the bankruptcy on March 12, 2001, in the amount of $540,040.59. Future additional installments are contemplated.

IX. SECURITY LITIGATION

2001 Recoveries – the SBA received approximately $8,418,000 from participation in class action cases resulting from the filing of proofs of claim; $ 1,257,498 from settlement of a private action against Network Associates; and $300,000 in payment of partial settlement of our private action against Compuserve (additional recovery is anticipated).

Attached hereto as Exhibit A is a list of the proofs of claim filed on behalf of the SBA by State Street for calendar year 2001.

Following are the cases in which the SBA is actively involved. Updates are provided in *italics*.

Abbreviations for Law Firms:
B&B = Bader and Bader; White Plains, NY
GLR = Goodkind, Labaton Rudolf and Sucharow; New York, NY
BD = Berman, DeValerio, Pease, Tabacco, Burt & Pucillo; Boston, MA and West Palm Beach, FL
G&E = Grant and Eisenhofer; Wilmington, DE
EC = Entwistle & Cappucci; New York, NY
BRB – Barrack, Rodos and Bacine; Philadelphia, PA
34 Act = The Securities Exchange Act of 1934

Advanced Fiber Communications - Approval to initiate litigation was given in July, 1998. The SBA lost approximately $7.4 million. The SBA is represented by BRB. Advanced Fiber distributes telecommunications equipment domestically and internationally. Misleading statements and estimates were made beginning in June, 1997 through June, 1998. The stock fell from $44 per share to $16 per share. This is a private case, not a class action. The Third Amended Complaint was filed on July 13, 2001. We are still awaiting the Court' s determination of the defendants' Motion to Dismiss. We are not in the discovery mode yet. Jurisdiction is in the Northern District of California.

Applied Micro Circuits Corporation - Approval to initiate litigation was given in June, 2001

The SBA lost approximately $9 million. The SBA is represented by BRB. AMCC designs and develops and manufactures silicone products for optical networks. In late 2000, Nortel, Cisco, Lucent and others were experiencing a slowdown in their own businesses and warned AMCC that their purchases going forward would be declining. Nevertheless, AMCC's senior executive made public statements to the effect that the company did not expect to experience a decline in orders and that it had a large order backlog. At the same time, there was approximately $100 million of insider trading. In February, 2001, AMCC announced that it was experiencing large order cancellations and delays in key products. The stock plummeted from $72 to $53 in one week. We moved to be lead plaintiff in the class action. *Update: Without a hearing and relying solely on the papers filed with the Court, Judge Keep appointed the SBA as lead plaintiff.*

Bank of America/NationsBank - Approval to initiate litigation was given in July, 2000. The SBA lost approximately $20-$50 million. The SBA is represented by G & E. Many class action lawsuits have been filed in the Eastern District of Missouri so we decided to file our own private case. The allegations arise from the 1998 merger of NationsBank and the Bank of America. Bank of America concealed its liability for several billion dollars of hedge fund losses. When the truth was announced after the merger, the stock of the combined company dropped almost $6 per share. Our complaint was filed in November 2000. *Update: the Judge has acknowledged that the SBA has the right to pursue claims independent of the class. On December 14th the SBA filed its Motion for Summary Judgment.*

Broadcom Corporation - Approval to initiate litigation was given in April, 2001. The SBA lost approximately $20 million. The SBA is represented by BRB. The Denver Employees' Retirement Plan moved first to be co-lead plaintiff. They retained the law firm of BRB. We have moved to be co-lead plaintiff with Denver. The essence of the wrongdoing is that Broadcom and certain of its officers violated the 34 Act in that they filed false financial statements and concealed material adverse information about agreements. There were gross violations of accounting standards. On August 7, 2001, Horace Schow authorized Barrack, Rodos & Bacine to proceed independently in the California state court system to recover our losses.

Cendant - Approval to initiate litigation was given in December, 1999. The SBA lost at least $40 million in the merger of HFS and CUC. This is the SBA's private lawsuit. The class action litigation is very complex with jurisdiction in New Jersey. We are represented by B&B. Settlement will probably not be reached before mid-2002.

Columbia/HCA Healthcare Corporation - Approval to initiate litigation was given in July, 1997. This case is different in that it is a stockholders derivative suit. The SBA did not lose money but the corporation did because of the misdeeds of the defendants. We are represented by B&B. This litigation is complex. One group of plaintiffs has filed derivative actions; another group has filed suits claiming violations of federal securities law. Both of these cases were on appeal in Cincinnati in the U.S. District Court of Appeals. Our case, filed in the Tennessee court system, had been stayed pending resolution of the federal cases. In August, 2001, the U.S. District Court of Appeals for the 6th Circuit (Cincinnati)

reversed the determination of the U.S. District Court for the Middle District of Tennessee which had dismissed the federal derivative actions. Discovery will now proceed.

CompuServe - Approval to initiate litigation was given in November, 1996. The SBA lost approximately $5.9 million. We are represented by the Atlanta law firm of Alston & Bird. This was a private case, not a class action. In May 2001, we received a check in the amount of $300,000 as partial settlement. *Update: a 3-day arbitration hearing was held in December; a decision is not expected for several months.*

Critical Path, Inc.- Approval to initiate litigation was given in March, 2001. The SBA' s losses range between $1.2 to a high of $2.3 million. We are represented by BD. In June, 2001, the SBA was appointed lead plaintiff. This is a revenue recognition case. Critical Path failed to follow guidelines set by the American Institute of Certified Public Accountants and SEC guidelines. Several officers, including the president and vice president of Critical Path, have resigned. The SEC has begun an informal inquiry. In early 2000, because of these wrongdoings, the stock fell from a high of $119 to $3.86. *Update: we have tentatively settled this case for payment of $17.5 million in cash and warrants to purchase 850,000 shares of common stock at an exercise price of $10 per share. The settled derivative case also includes certain corporate governance changes. The settlement is subject to notice to class members as well as review and approval by the Court.*

Daimler-Chrysler AG - Approval to initiate litigation was given in January, 2001. The SBA lost at least $77 million because of this November 1998 merger. We are represented by G&E and EC. There were numerous violations of the 34 Act and the Securities Exchange Act of 1933. Untrue statements and omissions were made in the registration statement. Untrue statements and omissions were made in the prospectus. False and misleading statements of material fact were also made in the proxy statements. On March 30, 2001, the SBA was designated as a co-lead plaintiff with Denver Employees, Chicago Police and Chicago Municipal Employees. A motion to dismiss has been filed and remains pending.

Dollar General - Approval to initiate litigation was given in May, 2001. The SBA lost approximately $10.4 million because of material restatements of financial results due to accounting irregularities attributable to the erroneous treatment of capital leases as operating leases. On July 20, 2001, the federal court appointed the SBA, Louisiana Teachers, and Philadelphia Employees to be co-lead plaintiffs with G&E and EC and Milberg Weiss as co-lead counsels. *Update: our amended complaint was filed January 3, 2002.*

Enron – approval to initiate litigation was given in December 2001. The SBA lost approximately $300 million. Enron, the country's largest trader of electricity and natural gas, filed for bankruptcy protection following a crisis of confidence among its investors. Much of the specifics regarding Enron are not currently clear and it may be years before the specifics are known to all. However, we do know that over four years of financial records have been restated by the company with an acknowledgment that its balance sheet was off by over $600 million. The problems resulted largely from Enron's dealings with private partnerships run by some of its own executives. Due to the substantial loss, the

SBA has applied to be appointed lead plaintiff in the class action filed in federal court in Houston. We are represented by BD & EC.

Green Tree Financial Corporation - Approval to initiate litigation was given in January, 1998. The SBA lost approximately $7.9 million. The basic theory of the securities fraud claims against Green Tree is that the assumptions the company was using in recording the gain on the sale of its securitized loan pool were unrealistic and were designed to artificially enhance pre-tax earnings. We are represented by BD. The case is before the United States District Court, District of Minnesota. Our individual complaint, not a class action, was filed in May, 1998. In August, 1999, the Court dismissed all class action suits as well as our case. We appealed. *Update: we received a favorable decision from the United States Court of Appeals for the 8th Circuit. Reinstating the controversy, the appeals court said that the facts pleaded with particularity add up to a strong inference of scienter – culpable intent to defraud - thus meeting the 1995 Private Securities Litigation Reform Act standard.*
Honeywell International, Inc.- Approval to initiate litigation was given in November, 2000. The SBA lost approximately $17 million. The SBA is represented by BRB. This case involves the merger of *"old"* Honeywell and Allied/Signal. The merger was alleged to have had a great cost savings to the merged corporation. Management of new Honeywell made glowing predictions of how well the company was doing. To the contrary, it was going downhill. There was also considerable insider trading. There are several class action suits filed in the federal court in New Jersey that have not yet been consolidated. Milberg Weiss will probably represent the class.

Lucent Technologies - Approval to initiate litigation was given in March 2001. The SBA lost approximately $280 million internally. We have more losses with our outside managers. The SBA is represented by EC. This will be our own private lawsuit filed in New Jersey, not the federal court system, alleging fraud and negligent misrepresentation.

Northrop Grumman Corp.- Approval to initiate litigation was given in August, 1998. We are represented by BD. This is a class action suit brought by the shareholders of Northrop arising out of false proxy statements made in January, 1998, by Northrop. This was to have been a merger of Northrop with Lockheed Martin. When the merger was announced in July, 1997, Northrop' s stock jumped from a value of about $80 per share to nearly $120 per share, reaching an all-time high of $139 per share in February, 1998. In March, 1998, Northrop revealed that it had been advised by the Justice Department that it was fundamentally opposed to the Lockheed/Northrop merger. Northrop's stock immediately fell from $137 to $111 per share. There are 2 federal lawsuits currently on file. The SBA is co-lead plaintiff with the law firm of Milberg Weiss. In April, 2000, the District Court entered a final judgment dismissing the complaint without prejudice and without leave to amend. This case is now on appeal in the United States Court of Appeals in the Ninth District. Oral argument was held on October 6th. *Update: the 9th Circuit affirmed the lower court's decision to dismiss for failure to state a claim pursuant to the Reform Act of 1995. There will be no further proceedings. The case is closed.*

Oxford Healthplan, Inc. - Approval to initiate litigation was given in November, 1997. The SBA lost approximately $16 million. The SBA is represented B&B. Oxford is one of the largest managed healthcare companies in the U.S. There were misrepresentations by Oxford relating to its earnings and to its potential increase in value. There were collection and payment difficulties in 1996. There were computer conversion problems. There was insider trading. The stock fell in October, 1997, from $68 per share to $25 per share. The jurisdiction here is the United States District Court, District of New York. This is our own private lawsuit, not class action. The District Court has granted class certification. We will opt out and will move the Court for a stipulation to permit the SBA to participate in the discovery proceedings.

Pediatrix Medical Group - Approval to initiate litigation was given in March, 1999. This case involves misbilling of the various medical facilities of Pediatrix with regard to neonatal babies. The SBA's losses could be at least $3 million. Overall, the claim is made that the stockholders lost at least $90 million. The SBA is represented by BD. The SBA is a co-lead plaintiff. The other co-lead plaintiffs are the Jacksonville Police and Fire Pension Fund and the New Orleans Employees' Retirement System. *Update: after significant discovery and negotiations, a tentative settlement arrangement has been struck. In addition to several corporate governance issues, the case has been tentatively settled for $12 million.*

Rent-Way, Inc. - Approval to initiate litigation was given in November, 2000. The SBA lost approximately $6 million. The SBA is represented by BRB. This case involves accounting irregularities. The company had to revise earlier unaudited financial results for fiscal year 2000. The president and the COO were suspended. The market reaction to these irregularities were such that the common stock dropped from $23 to $4.75 per share in October, 2000. In March, 2001, the Court denied the SBA's Motion to be Lead Plaintiff because Cramer Rosenthal & McGlynn, a money management firm, had a larger financial interest in this case than the SBA. Cramer purports to have a loss of approximately $10 million. This decision is the first of its kind. The argument was made in opposing Cramer that Cramer on its own did not lose any money. Instead, it purchased the securities on behalf of its clients. The SBA also contended that Cramer had violated the certification provisions of the Reform Act of 1995 by failing to provide adequate evidence that its clients were aware of the lawsuit and had authorized its filing. We will pursue this case on an individual basis.

Rite-Aid Corporation - Approval to initiate litigation was given in February, 2000. The SBA may have lost as much as $43 million. The SBA is represented by EC. This will be our own lawsuit. We will opt out of the class action litigation. Rite-Aid is one of the largest drugstore chains in the U.S. The allegations here are that the defendants wrongfully concealed and misrepresented the company's true financial picture. As a result, the stock dropped from $60 per share to about $5 per share. There have been many class action suits filed in Pennsylvania. In November, 2000, the SBA entered into an MOU. We should receive $1.5 million in cash and $4.75 million in shares of Rite-Aid stock to be delivered later. It may be many months before final settlement is achieved.

Shering-Plough - Approval to initiate litigation was given in March, 2001. The SBA lost approximately $34 million. The SBA is represented by BRB. The case centers around misleading statements Shearing made about its manufacturing problems associated with the FDA. There was also insider trading. The stock fell from a high of approximately $60 per share to $35 per share. In June 2001, the Court appointed the SBA to be lead-plaintiff. *The consolidated amended complaint was filed October 11, 2001.*

Sykes Enterprises, Inc.- Approval to initiate litigation was given in February 2000. The SBA lost approximately $900,000. The SBA is represented by BD. Sykes describes itself as providing information technology outsourcing services. It is also involved with large telephone call centers. The company made misleading earning statements in 1999. At one time the stock traded at $47 per share. When the misleading statements were revealed, the stock dropped to approximately $14 per share. The case is in the United States District Court, Middle District of Florida, Tampa Division. The Court has appointed the SBA and Louisiana State Employees appointed as co-lead plaintiffs; the two co-lead counsel firms are BD and Bernstein, Litowitz, Berger, and Grossman.

Telxon Corporation - Approval to initiate litigation was given in February 1999. The SBA's losses were approximately $425,000. The SBA is represented by GLR. The litigation is complex. The SBA had moved to be lead plaintiff but was rejected by the Court because of the 5-3 rule. A contributing factor in this decision was that the SBA did not have the greatest financial loss. We will wait to see how the federal case progresses before deciding whether to opt out in order to take more aggressive action on behalf of the SBA. Basically, this means that we will wait until the federal litigation in Ohio comes to a more definite conclusion that may be many months from now.

Vesta Insurance Group - Approval to initiate litigation was given in July 1998. The SBA's losses were approximately $1.5 million. The SBA is represented by GLR. This is before the federal court in Birmingham, Alabama. This is the *"c oin-tossing case."* The Judge was unable or unwilling to decide who would be lead-plaintiff and was going to flip a coin to see who would be selected. Eventually it was decided that the SBA would be a co-lead plaintiff. This case moved slowly. *Update: in addition to substantial corporate governance changes, settlement in the amount of $ 61 million has been agreed upon.*

Waste Management, Inc. II - Approval to initiate litigation was given in June 2000. The SBA's losses could be as high as $29 million. The SBA is represented by EC. The class action suits have not yet been consolidated. We will probably file a private action in the federal court system in Texas. There have been more than 30 class action complaints filed against Waste Management. The plaintiffs allege in general that the company and certain of its officers and directors made knowingly false earnings projections for the 3 months ending on June 30, 1999, and failed to adequately disclose material facts relating to those forecasts. There was also insider trading. The SBA's complaint was filed on March 21, 2001.

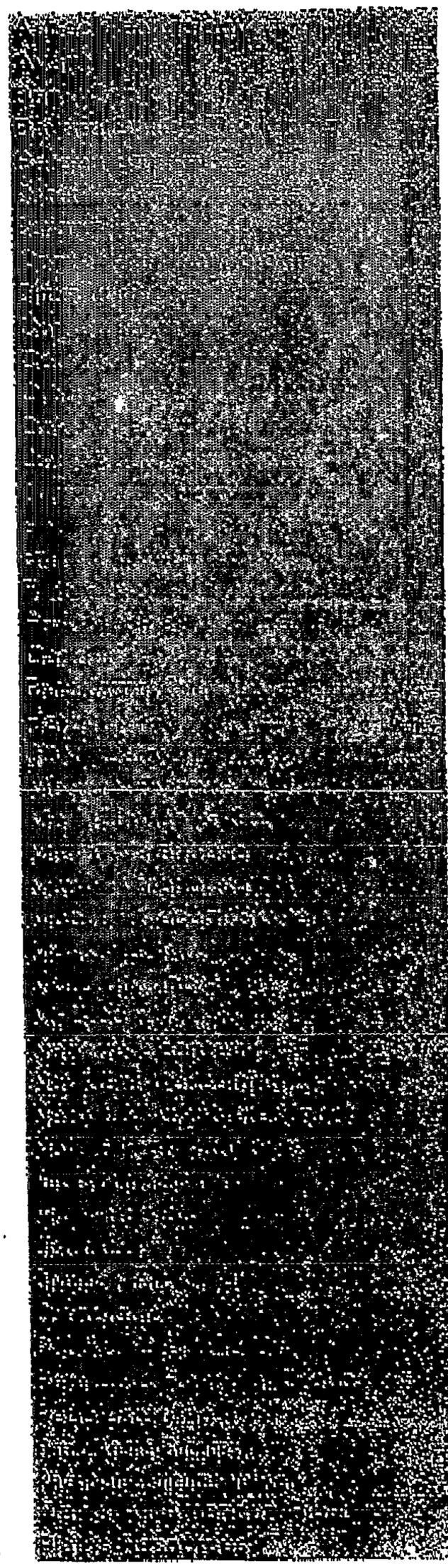
Xerox Corporation - Approval to initiate litigation was given in May 2001. The SBA lost approximately $100 million. The SBA is represented by G&E. The wrongdoing is typical of

these types of cases. There occurred accounting fraud and other false and deceptive accounting and reporting practices in violation of the 34 Act. The stock fell from $124 per share to as low as $4.43. The various class action cases have not yet been consolidated. Because our losses were so great, we will probably opt out of the class and file our own independent action. *Update: the complaint was filed in federal court for the Northern District of Florida on January 4, 2002.*

xc: All Chiefs, Robert Copeland, Janie Knight, Martha Hurdle, Jason Buchholz, Ken Menke, Elizabeth Mozley, Mike McCauley, Walter Kelleher, OGC Staff, Russell Bjorkman

EXHIBIT A

	[redacted]	DISTRICT	[redacted]
1		County of Santa Clara	No. CV755730
2			MDL Docket No. 1219
3			MDL Docket No. 1263
4		Central District of California	CV-98-6483-'WMB
5		District of Massachusetts	No. 00-11127-WGY
12			



Superior Court of California	No. CV775037
Northern District of California	No. C-96-20132 RMW (EAI)
Northern District of Illinois	CA No. 00 C 880
Western District of Oklahoma	No. CIV-98-171-M
Central District of California	No. SACV-99-1306-AHS (Anx)
District of Connecticut	No. 3:95CV1947/02564/02326
Southern District of New York	No. 99 Civ. 2271 & 3379
District of Massachusetts	No. 1:97-10304-REK
District of Connecticut	No. Civ 398CV00480(WWE)
Court of Common Pleas	No. 96 CVG-06-4810
Western District of Washington	No. 98-2391-III
Eastern District of Michigan	No. 98-70417
District of Massachusetts	No. 96-12109-GAO
Middle District of Florida	No. 97-3007-CIV-T-26E
Northern District of California	No. C 96-20867-RMW (EAI)
Southern District of Iowa	No. 4-99-CV-10590
Northern District of Texas	No. 3-98-CV-1808-M
District of Connecticut	No. 3:97-CV-2619 (JCH)
Southern District of California	No. 98cv0928-L
Superior Court of New Jersey	No. BUR-L-02401-96
District of Minnesota	No. 4-96-890 (JRT RLE)
Northern District of Georgia	No. 1:99-CV-2353-MHS
	No. 1:00-CV-0396-RWS
Northern District of Illinois	No. 97 C 1277/3035
Southern District of NY	No. 94 Civ. 9043 (SS)
District of Connecticut	No. 3:96-CV-1920 (DJS)
District of Connecticut	No. 3:96-CV-02264 (DJS)
Southern District of Mississippi	No. 3:98-CV-112WS
Central District of California	No. SACV-97-761-GLT
Northern District of Illinois	No. 96-C-1069
Southern District of California	No. 00-CV-1873-K(NLS)
SS	No. 97-74587
Northern District of Illinois	No. 99C07617
Northern District of California	No. C-99-01729-WHA
District of Colorado	No. 99-WM-1274
District of New Jersey	No. 94-4213
Northern District of Illinois	No. 97 C 7362
Eastern District of NY	No. 97-CV-5056
District of Minnesota	No. 97-496 (MJD/JGL)
Superior Court of Arizona	No. CV-96-10799
Central District of California	CV 98-4163 MMM (JGx)
	No. 98 Civ 5998
Northern District of California	No. C-99-0472-WHA JL
Southern District of California	No. 98 CV 1521-L(POR)
District of New Jersey	No. 98-981 (FSH/SRC)
Southern District of Texas	No. H-99-4137
Southern District of Texas	No. H-99-4212

53		Middle District of Tennessee	No. 3:98-0458
54		Northern District of Illinois	No. 98 C 3123 (RP)
55		Middle District of NC	No. 1:99CV00854 (WLO)
56		Eastern District of PA	No. 99-CV-1349 (SD)
57		Southern District of New York	Civ 1041 (DLC)
58		Southern District of California	No. 98cv1891-L(JAH)
59		Superior Court of California	Lead Case No. 803080
60		Southern District of Florida	No. 98-8258-Civ
61		Central District of California	No. 99-CV-1746-CBM
62		Northern District of Texas	No. 3:97-CV-2819-L
63		District of Minnesota	No. 98-1888 JMR/FLN
64		Northern District of Illinois	No. 98 C 7482
65		Northern District of Georgia	No. 1:96-CV-1355-TWT
66		Superior Court of California	No. V-014193-6
67		District of Massachusetts	No. 94-11579-NG

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE CRITICAL PATH, INC., SECURITIES LITIGATION.

No. C 01-00551 WHA

ORDER DECLINING PRELIMINARY APPROVAL OF CLASS SETTLEMENT

INTRODUCTION

This order **DECLINES** to grant preliminary approval to a proposed class settlement until the problems described below are cured. This order makes some suggestions for cure but other solutions may occur to the parties.

STATEMENT

In early February 2001, 32 securities class actions were brought against Critical Path, Inc., its officers and directors, and its outside auditors, PriceWaterhouseCoopers. Judge William H. Orrick, who then consolidated and supervised the actions, summarized them in a prior order (dated June 28, 2001). In brief, Critical Path was and is in the business of providing end-to-end Internet messaging and collaboration solutions for, among others, Internet service providers, web portals, and web hosting companies. It went public in March 1999. Its stock rose 174 percent on the first day of trading. Although the NASDAQ suffered a sharp decline in mid-April 2000, Critical Path's stock recovered by September 2000. Critical Path's customers, however, fell into financial trouble. Defendants knew that many of its customers were cutting costs in a way that would negatively impact Critical Path. Nevertheless,

defendants allegedly disseminated materially-misleading information, which generally consisted of optimistic predictions by Critical Path executives about the company's future profitability.

On October 19, 2000, Critical Path reported record financial results for the third quarter. Defendants continued to predict increased revenue for the fourth quarter. On January 18, 2001, the company revealed that revenues had in fact declined. In response to this disclosure, analysts downgraded the stock. The stock price sharply declined, trading at a record volume of more than 29 million shares.

On February 2, 2001, Critical Path issued a press release stating that it had initiated an investigation into its own revenue-recognition practices, that it believed that the results for 4Q2000 may have been materially misstated, and that it had placed its president, David Thatcher, and vice-president of worldwide sales, William Rinehart, on administrative leave. The statement said that the company had discovered a number of questionable practices. In other words, the loss reported for 4Q2000 was even worse than previously stated. Following the issuance of this press release, Critical Path's stock price plummeted. The 32 suits followed.

* * *

By order dated June 28, 2001, Judge Orrick appointed the Florida State Board of Administration as the "lead plaintiff," a statutory fiduciary post established by the PSLRA. 15 U.S.C. 78u-4(a)(3)(B). By order dated August 9, Judge Orrick then approved the lead plaintiff's selection of class counsel — the law firm of Berman Devalerio Pease Tabacco Burt & Pucillo. No other firm was approved or authorized. Judge Orrick adopted a putative class period of October 20, 2000, through February 1, 2001 (Order dated June 28, 2001, at 4).

Shortly thereafter (on August 31, 2001), class counsel filed a Consolidated Amended Class Action Complaint. The face page of the pleading comported with Judge Orrick's order in that the only plaintiff identified was FSBA on behalf of the putative class and the only "Attorneys for Plaintiffs" were class counsel, *i.e.*, the Berman law firm. Appearing several pages into the pleading, however, were certain additional plaintiffs. These were individuals, all with the last name Hall, who had exchanged their shares in a company called PeerLogic, Inc., for shares in Critical Path. This exchange had been pursuant to a merger prior to the

class period adopted by Judge Orrick. In addition to the familiar allegations involving open-market transactions in the class period, the new complaint challenged the exchange on behalf of former PeerLogic shareholders. FSBA, the lead plaintiff, was not involved in the exchange. On the signature page, class counsel signed, as would have been expected, as "Attorneys for Plaintiffs." The same page carried a block, however, identifying (without signature) a different law firm as counsel for "the PeerLogic plaintiffs." That firm had never been authorized of record to appear in the action. Nor had the Halls. Both the Halls and their counsel had vied for the lead plaintiff and counsel posts but had been rejected by Judge Orrick.

On September 24, 2001, the same PeerLogic plaintiffs, along with many other former PeerLogic shareholders, filed a class action in state court in San Francisco. The action was for breach of contract and warranty arising out of the apparent breach by Critical Path of its merger warranties and the alleged existence of a "Material Adverse Effect" that would allegedly have allowed PeerLogic to call off the merger. The suit did not allege any violation of the securities laws or invoke fraud. Defendants removed the case. Now it is pending in this Court as Civil Action C-01-03756 (subject to an unresolved remand motion). The plaintiffs in the state action are represented by the same counsel stated to be representing them in the consolidated complaint herein. The firm is Bernstein Litowitz Berger & Grossman LLP, with offices in New York City and San Diego. Twenty-nine plaintiffs are listed, including the Halls. Janet Kay Adam is the first name in the caption of the removed state court action.

* * *

Shortly after the filing of the amended consolidated complaint on August 31, 2001, the lead plaintiff and defendants agreed to mediation. To learn more about the case, class counsel obtained 83 boxes of defendants' documents concerning the restatement of financial results. Class counsel also received information from an expert economist, although no details of the information have been provided. Counsel then agreed on a private mediator, a former full-time magistrate judge of this district court. Sessions were held on October 5, October 23 and perhaps other dates. By the first week in November 2001, an agreement in principle had been reached. A formal agreement was signed on December 13, 2001.

Class counsel's investigation showed that the company had materially misstated its revenues and earnings by (a) booking revenue on fictitious software licensing transactions; (b) entering into side agreements with customers; (c) backdating contracts; and (d) leaving the company's books open after the close of the quarter in an effort to report additional sales in the third quarter that were properly recorded in the fourth quarter. At the end of the fourth quarter, counsel concluded, defendants arranged three or more sham sales, adding $6.3 million or more in false and fictitious revenue.

No depositions have been taken. No formal discovery has occurred. No class counsel interviews of defendants have occurred nor have defendants given statements. The extent of the investigation by class counsel has been a document review of 83 boxes of materials informally provided.

The settlement would compromise the foregoing actions for $17.5 million plus 850,000 warrants. Eighty percent of the cash would go to "open market" class members and the rest would go to the so-called PeerLogic class described below. The warrants are exercisable over the next three years for ten dollars per share (in Critical Path). Critical Path shares are now trading at three dollars, so the warrants are submerged for the time being. How the warrants would be allocated is not known to the Court.

In December 2001, class counsel wrote to Judge Orrick suggesting that the settlement-approval responsibility be assigned to the private mediator, who also happens to serve as a part-time magistrate judge in our district court. Judge Orrick did not act on the request before his recent retirement. When the case was reassigned to the undersigned, the same request was made again. This Court, however, concludes it is better for someone other than participants in the settlement process to assess its fairness and reasonableness. A formal hearing on preliminary approval occurred on January 17, 2002.

ANALYSIS

Rule 23 requires that all settlements of class actions be approved by the district court. There are two stages of approval — preliminary and final. The purpose of a preliminary review is to see if the proposed settlement and proposed notice are sufficient to send out to the class for

comment and invite members in for a hearing on final approval. In a preliminary review, a judge never simply substitutes his or her judgment for that of the lawyers. The settlement, however, must be in sufficient order to be ready to be disseminated and sufficiently reasonable to warrant dissemination.

The following problems with the proposed settlement and notice lead the Court to conclude that the present submission is not ready for release:

1. Before turning to the substance of the settlement, it is important to appreciate a severe procedural snafu. The settlement would resolve two separate lawsuits — one brought by FSBA for open-market purchases and a separate one brought on behalf of the former PeerLogic shareholders. In filing the consolidated amended complaint, however, the lead plaintiff and class counsel were authorized to proceed only with the former. The PeerLogic plaintiffs and their lawyers were not authorized to inject themselves into the action. Judge Orrick rejected the Halls as lead plaintiffs. He never appointed the Bernstein firm as class counsel or to have any role whatsoever. He never enlarged the class period to include the period of the PeerLogic merger. The PeerLogic lawsuit would not appear to belong in the consolidated amended complaint.

That said, two separate lawsuits can, as a theoretical matter, be compromised in one global agreement. This is even true for two separate class actions. But to do so, each class settlement must be carried out with fidelity to Rule 23 and must be in a proper procedural posture. The PeerLogic suit is not now in such a posture. No lead plaintiff has been approved for the securities claims now asserted on behalf of PeerLogic shareholders.[1] No class representative has ever been certified. No court has blessed the Bernstein firm as class counsel. None of the usual procedural safeguards have been met to impose fiduciary obligations for protection of the PeerLogic shareholders.

To cure these shortcomings, it might now be possible to certify a settlement class and appoint the Bernstein firm and the Halls. No information or declarations, however, have been

[1] Although the removed action includes no securities claims, the consolidated amended complaint does, even as to the PeerLogic shareholders.

provided with this motion to specify the qualifications of the Hall plaintiffs or of their counsel, their role in the settlement, their due diligence in arriving at a settlement figure, and so forth. No declaration at all, in fact, has been received in this submission from the Bernstein firm or the Halls. Curiously, the proposed order offered by the parties totally ignores the Halls, never approves them as class representatives, and leaps over the issue of who would be leading the PeerLogic class, much less whether they are qualified to do so. The proposed order, as submitted, would not even approve the Bernstein firm. So the first problem is that the case is not yet in the right procedural posture to compromise class claims.

2. This leads, in turn, to a substantive concern — a concern over the plan of allocation. The plan would route twenty percent of the $17.50 million (less attorney's fees and costs) to the PeerLogic shareholders. The problem is that the allocation has no support in the record. Nothing has been submitted to allow an independent assessment by the Court even on a preliminary basis. No declaration has been filed by the PeerLogic plaintiffs or by their counsel. Thus, there is no explanation by them of the factors they considered in arriving at the twenty percent share. Nor is there any showing of due diligence. Although class counsel for FSBA at least analyzed the 83 boxes and retained an economist to assist (Tabacco Decl. ¶ 8), nothing of the sort was done by the Bernstein firm so far as the record reveals. (It is not even clear that the 83 boxes adequately covered the earlier time period leading up to the PeerLogic merger.) In short, there is no record support to show that the Halls or the Bernstein firm did sufficient due diligence before agreeing to compromise the claims of the former PeerLogic shareholders. And, no evidence or summaries or expert declarations have been submitted to support the substance of the PeerLogic settlement. Perhaps the twenty percent is fair. Perhaps it is not. The problem is that there is no way to assess the question, even through the forgiving lens used in preliminary approvals. The plan of allocation, therefore, cannot be preliminarily approved at this time.

3. As for the open-market trades, there is a terse declaration from class counsel. The main problem is that class counsel's investigation supports a maximum recovery of over $200 million (not counting the PeerLogic shares) and class counsel wishes to release it for only

$13.6 million (80% of $17.5 million). In justifying this large discount, class counsel cites, in conclusory fashion, "the risks of proving liability" (Decl. ¶ 16). How counsel can calibrate those "risks" when *no* depositions whatsoever have been taken is a mystery. The fact that the documents evidently show large fictitious sales inflating the fourth-quarter revenue — plus the admissions and extraordinary curative steps taken by the company itself after the fact — indicate that liability will not be an overly difficult issue. Also cited is the "complicated nature of proof of damages" (¶ 16). This conclusory phrase probably refers to the need to factor out extraneous market forces in tracing the portion of the stock plummet attributable to the actionable statements. For this, one would have expected the "retained economist" or counsel to supply a declaration explaining any difficulty. None was filed. So it is impossible to assess the extent to which this could justify a low-end settlement.

The most legitimate consideration (on this record) supporting a low-end settlement without depositions is the risk of a bankruptcy of Critical Path. This consideration, however, is mitigated by three facts. *First*, the company has not filed for bankruptcy and, in fact, has received new financing. Its stock is now trading at three dollars. *Second*, the $17.5 million global settlement falls far short of the thirty million dollars in available insurance coverage. The submissions offer second-hand speculation that defense costs were consuming the coverage at a fantastic "burn rate." There is no detail or proof, however, to support the suggestion. The declaration falls far short of stating that all of the coverage was consumed by the settlement and defense costs. The Court would like to know (and the class should know) how much remains unpaid under the policies. *Third*, no investigation whatsoever has been conducted to ascertain the net worth and ongoing income of the defendant officers and directors, at least insofar as this record shows. They are, after all, defendants. They must be expected to respond to any judgment based on any wrongdoing by them in the absence of adequate insurance. If insurance limits truly drove the settlement, then we need to know the extent of other plausible sources of recovery. Declarations from the defendants stating their approximate assets and liabilities and income sources would be most helpful.

4. As for due diligence by the plaintiffs, no preliminary approval should be given until the representative member supplies a declaration explaining his or her role in the negotiations and stating why he or she recommends the settlement. The lead plaintiff, who is supposed to direct the litigation for the class, submitted a declaration at the Court's request. The declaration shows that FSBA had some settlement involvement, although FSBA did not attend the mediations. Ultimately, FSBA gave class counsel authority to accept $17.5 million "for the class action" (¶ 7). In fact, only $13.6 million will go to the class action, the rest going to the PeerLogic shareholders. The declaration is oblivious to the PeerLogic problem or any allocation issue. As stated, the Halls filed no declaration at all. Both should now file appropriate declarations.

5. The notice to the class needs improvement in several ways. *First*, the summary cover page required by the PSLRA must be added (§ 78u-4(a)(7)). *Second*, in order to allow class members to meaningfully evaluate the settlement, the notice should state the amount of maximum damages in plaintiffs' (and defendants') views, if the case should go to trial. *Third*, the pro-and-con discussion for the settlement should disclose the fact that no depositions or formal discovery have been taken, should address the extent to which the available insurance was committed to the settlement, and the extent to which the defendants financially could respond to a judgment. *Fourth*, a statement of reasons supporting the fee and expense is required (§ 78u-4(a)(7)(C)). *Fifth*, the basis for the plan of allocation should be described in more detail. The notice should also set forth the results of class counsel's investigation, the sham sales and the dates thereof. The specific false statements made and the dates thereof will assist class members (and the Court) in understanding the strength of their respective cases. The plan of allocation for the warrants and the fact that they are currently underwater should be disclosed. *Sixth*, the procedural posture of the two separate cases should be clarified. *Seventh*, "Net Settlement Fund" is used in inconsistent ways (compare page 5 with page 11). Typos appear (see page 9). Please comb out all glitches in the notice. *Eighth*, the notice should adequately address the problems referenced earlier in this order.

6. The parties propose to provide mailed notice but *only* to the extent the defendants still have any mailing addresses for class members. The parties should find out the answer to the latter question, *i.e.*, the extent to which class members' addresses are, in fact, known. Then, we can decide on the extent to which alternate publication will be needed to comport with due process.

CONCLUSION

The parties have until February 1, 2002, to make submissions curing the foregoing problems.

IT IS SO ORDERED.

Dated: January 17, 2002.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

For the Northern District of California

dt

United States District Court
for the
Northern District of California
January 17, 2002

* * CERTIFICATE OF SERVICE * *

Case Number:3:01-cv-00551

Cohn

vs

Critical Path Inc.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on January 17, 2002, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Francis M. Gregorek, Esq.
Wolf Haldenstein Adler Freeman & Herz LLP
Symphony Towers
750 B St
Ste 2770
San Diego, CA 92101

Betsy C. Manifold, Esq.
Wolf Haldenstein Adler Freeman & Herz LLP
Symphony Towers
750 B St
Ste 2770
San Diego, CA 92101

Francis A. Bottini Jr., Esq.
Wolf Haldenstein Adler Freeman & Herz LLP
Symphony Towers
750 B St
Ste 2770
San Diego, CA 92101

Nadeem Faruqi, Esq.
Faruqi & Faruqi LLP
320 East 39th St
3rd Flr

New York, NY 100

Ira M. Press, Esq.
Kirby McInerney & Squire LLP
830 Third Ave
10th Flr
New York, NY 10022

Jill M. Manning, Esq.
Kirby McInerney & Squire, LLP
7665 Redwood Blvd
Ste 200
Novato, CA 94948

Kenneth A. Elan, Esq.
Law Office of Kenneth A. Elan
217 Broadway Ste 404
New York, NY 10007

Joseph P. Garland, Esq.
Klein & Solomon LLP
275 Madison Ave Ste 200
New York, NY 10016

Robert C. Schubert, Esq.
Schubert & Reed LLP
Two Embarcadero Center
Ste 1660
San Francisco, CA 94111

Juden Justice Reed, Esq.
Schubert & Reed LLP
Two Embarcadero Center
Ste 1660
San Francisco, CA 94111

Robert S. Green, Esq.
Green Fauth & Jigarjian, LLP
235 Pine Street
15th Floor
San Francisco, CA 94104

Ignacio E. Salceda, Esq.
Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, CA 94304-1050

Nina F. Locker, Esq.
Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, CA 94304-1050

Steven M. Schatz, Esq.
Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, CA 94304-1050

James D. Baskin, Esq.
Baskin Bennett & Komkov
929 Congress Avenue

Suite 1000
Austin, TX 78701

Bruce L. Simon, Esq.
Cotchett Pitre & Simon
840 Malcolm Rd Ste 200
Burlingame, CA 94010

Marie Seth Weiner, Esq.
Cotchett Pitre & Simon
840 Malcolm Rd Ste 200
Burlingame, CA 94010

Mark C. Molumphy, Esq.
Cotchett Pitre & Simon
840 Malcolm Rd Ste 200
Burlingame, CA 94010

Mario B. Muzzi, Esq.
Cotchett, Pitre & Simon
San Francisco Airport Office Center
840 Malcolm Road, Suite 200
Burlingame, Ca 94010

Richard W. Wieking, Clerk

BY: DAWN K. TOLAND
Deputy Clerk

New York, NY 100

Ira M. Press, Esq.
Kirby McInerney & Squire LLP
830 Third Ave
10th Flr
New York, NY 10022

Jill M. Manning, Esq.
Kirby McInerney & Squire, LLP
7665 Redwood Blvd
Ste 200
Novato, CA 94948

Kenneth A. Elan, Esq.
Law Office of Kenneth A. Elan
217 Broadway Ste 404
New York, NY 10007

Joseph P. Garland, Esq.
Klein & Solomon LLP
275 Madison Ave Ste 200
New York, NY 10016

Robert C. Schubert, Esq.
Schubert & Reed LLP
Two Embarcadero Center
Ste 1660
San Francisco, CA 94111

Juden Justice Reed, Esq.
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Two Embarcadero Center
Ste 1660
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650 Page Mill Road
Palo Alto, CA 94304-1050

Nina F. Locker, Esq.
Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, CA 94304-1050

Steven M Schatz, Esq.

Tallahassee.com

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Governor, speaker kick off Enron probes

By Nancy Cook Lauer
DEMOCRAT CAPITOL BUREAU CHIEF

Two new investigations into Florida's disastrous experience with Enron stock were launched Tuesday.

Gov Jeb Bush asked lawyers to look into suing the company that bought shares on the state's behalf, and House Speaker Tom Feeney created a committee to find out what caused the $325 million loss to the state's $95 billion pension fund.

Bush asked the State Board of Administration, which oversees the pension fund, to determine whether the state could sue Alliance Capital Management Corp. for continuing to buy shares of Enron stock even as the energy giant catapulted toward bankruptcy. One of Alliance's executives, Frank Savage, also was a board member of Enron

Bush said he wanted the investigation to start "quicker rather than slower just because of the nature of these really complicated cases; I assume it's correct to say that the quicker you do something like this, the greater the amount of information you might receive."

Comptroller Bob Milligan and Treasurer Tom Gallagher, who along with Bush make up the state board, agreed with the governor. So did Attorney General Bob Butterworth, who has already issued racketeering subpoenas to Alliance, Enron and its auditor, Arthur Andersen. Florida - which is thought to have suffered the biggest loss of all investors - already is suing Enron and Arthur Andersen.

"We believe Alliance is probably the one we should be going after first - everybody else is going after Enron and Arthur Andersen," Butterworth said.

Alliance was fired shortly after the purchases were discovered. Company spokesman John Meyers declined to comment when contacted by the *Tallahassee Democrat* on Tuesday.

Meanwhile, Feeney, R-Oviedo, named Rep. Mark Flanagan, R-Bradenton, chairman of the newly created House Select Committee on Oversight and Accountability for Florida's Pension Funds. It was not known Tuesday whether Senate President John McKay also will impanel a committee.

"As the committee chair, it is my intention to uncover any inadequacies or weaknesses in our current investment system Florida must ensure the confidence of the participants in the state pension plan by maintaining the safety, soundness and choice in the program," Flanagan said in a statement.

Bush said it's the Legislature's prerogative to investigate, but he's not sure it's necessary.

"I think it's our duty to do it," Bush said. "The Legislature always has the right to pursue inquiries, but I think just as a trustee of the SBA, I think it's appropriate for us to pursue this and pursue it pretty aggressively."

House and State Board of Administration Executive Director Tom Herndon have often been
lds, and Feeney makes no bones about the committee's plans to look at Herndon and his
en.. oyees as part of the investigation.

"To the extent they want to investigate themselves, most agencies would like to be self-investigated," Feeney said. "At the outset, we certainly want to know how the SBA and individuals working within the SBA, how they interact with private individuals like Alliance Corp. . We have an obligation to provide legislative oversight."

- Nancy Cook Lauer can be reached at (850) 222-6729 or nlauer@taldem com

INSIDE

The New York Times

January 27, 2002, Sunday, Late Edition - Final

SECTION: Section 1; Page 32; Column 1, National Desk

LENGTH: 1233 words

HEADLINE: ENRON'S MANY STRANDS: FALLOUT;
The Enron Scandal Grazes Another Bush in Florida

BYLINE: By LESLIE WAYNE

BODY:

The Enron scandal, which has become the consuming interest in Washington and around the country, is starting to have a particular resonance in Florida, where it is touching another Bush: Governor Jeb Bush.

Florida's state pension fund lost $335 million from its Enron holdings. Enron has spread lavish campaign donations on local politicians, including Mr. Bush. Earlier this month, Mr. Bush startled some by holding a fundraiser at the Houston home of a former Enron executive. Florida is also home to thousands of Enron investors and retired employees, who have seen their Enron shares become worthless.

Yet as these events unfold, Mr. Bush has deftly sidestepped this political minefield, avoiding, at least for the moment, any negative association with Enron.

"Both parties are holding their breath right now," said Susan MacManus, a political science professor at the University of South Florida at Tampa. "Both are scared as rabbits that Enron really has the potential to affect things here -- the Democrats are worried it won't have an impact and the Republicans are worried it will."

Mr. Bush particularly has been able to steer clear so far of the enormous damage to the state employees' pension fund, which lost more than any other public pension fund. Almost until Enron collapsed, the Florida fund continued to pour money into Enron stock. As governor, Mr. Bush is one of the fund's three trustees, although the fund has said that Mr. Bush never ordered the purchase of Enron shares or the hiring of the money manager who did.

"You've got to credit Jeb Bush," said Richard Scher, professor of political science at the University of Florida at Gainesville. "He's been wonderful in keeping the issue quiet. Nothing has been coming out. He's been very shrewd in how he's handled it politically and lucky the legislature is in session and drawing attention away. The Enron Florida angle has not come home to roost yet."

Even Mr. Bush's decision to travel to Houston and raise money on Jan. 17 at the home of Richard Kinder, a former Enron president, has yielded no political advantage for Democrats.

"Jeb Bush showed complete insensitivity and arrogance by doing the fundraiser at the former Enron president's home last week," said Bob Poe, chairman of the Florida Democratic party. "It raises questions as to what links he might have with Enron. He's drawn attention to himself with it. But if any of this sticks to him, who knows?"

To some extent, how Enron affects Mr. Bush may also depend on whether the scandal taints President Bush.

"He is the president's brother and, to some, they are always stuck together at the hip with glue," said Ms. MacManus, the political science professor. "Democrats would love to link the two together if something bad happens to one of them."

The New York Times, January 27, 2002

In his recent state of the state address, Governor Bush avoided any mention of Enron, and Karen Unger, his 2002 gubernatorial campaign manager, says the intention is to keep it that way. "Enron is not a partisan issue," she said. "It's not much of a campaign story."

Ms. Unger said Mr. Bush would "focus on his record of accomplishments and on issues that Floridians are concerned about." Ms. Unger also said Mr. Bush "saw no problem" in the Houston fundraiser since the event's host, Mr. Kinder, was no longer an Enron employee, having left in 1996 to form his own energy company.

But the way Enron spread money around the state to gain support in the legislature for its plan -- never enacted -- to deregulate the local electricity market and build more power plants is beginning to gain attention. Starting in 1995, Enron began to give the maximum $500 donation to many candidates, giving a total of $154,425 in the key 1996 and 1998 state house races, with over 80 percent of the money going to Republicans. Mr. Bush's 1998 gubernatorial campaign received $6,500 from Enron, including $1,000 from the former chief executive, Kenneth L. Lay, and his wife.

"Enron was a big behind-the-scenes player in the push to deregulate Florida's electrical markets," said Holly Binns, a spokeswoman for the Florida Public Interest Research Group, an environmental organization.

"Were there any specific connections between Enron and Governor Bush? You cannot tell for sure. But I would be extremely surprised if the level of contributions by Enron to the national Republican party and to President Bush did not provide access to Governor Bush."

For many Floridians, Enron's most disturbing impact has been the massive losses suffered by the Florida State Board of Administration's $123 billion pension fund, one of the largest public employee funds. The fund lost $325 million from its 9.1 million Enron shares, and $9 million from Enron bonds. It is one of several public pension funds that suffered multimillion-dollar losses from their Enron holdings

As Enron's problems surfaced, the state fund, under the advice of one of its money managers, Alliance Capital Management, continued to buy the company's shares.

Last October, after Enron announced $1.2 billion in losses and the Securities and Exchange Commission opened its investigation, the fund bought $7.1 million more of Enron stock. After Enron's chief financial officer, Andrew S. Fastow, was ousted on Oct. 24, the fund bought $16.1 million. When Enron announced last November that it had overstated its profits, the fund bought still another $11 7 million.

Having bought shares for as much as about $80 in the past, the fund, as it continued buying, rode the stock down from $43 to 28 cents a share in the two months before Enron's bankruptcy filing.

On Nov. 30, just days before Enron's bankruptcy filing, the Florida fund sold 7.6 million shares for 28 cents each -- getting just $2.1 million for its investments

Alliance Capital was one of 60 outside money managers handling portions of the fund. Each money manager has broad discretion, under the supervision of the fund's Tallahassee staff

Currently the Florida pension fund is suing Enron over the losses and has said it might sue Alliance as well. Fund managers say they are troubled that they were never told that a top Alliance executive, Frank Savage, is a member of Enron's board.

Florida's pension fund managers say that Alliance, the fund's manager of large-capitalization growth stocks, was repeatedly questioned by the fund's staff about Enron as its shares continued to slide. A spokesman for Alliance Capital, John Meyer, declined to comment on the matter yesterday

At no time, however, was Governor Bush a part of these discussions as a trustee, Mr. Bush does not get into the details of specific investments, but instead oversees the fund's general policies and direction, said Coleman Stipanovich, deputy executive director of the fund.

The New York Times, January 27, 2002

"We had a fair amount of discussions with Alliance about what was happening with our Enron shares," Mr. Stipanovich said. "There were plenty of red flags and we would talk about them. But Alliance ignored the red flags and relied way too much on the accountants and their auditor's reports." In the end, he said, the fund fired Alliance as one of its money managers.

Whether these financial losses will cost Mr. Bush some political capital remains to be seen. "The Enron issue is right out there to be seized on," said Mr. Scher, the political science professor. "But no one has done anything with it yet."

http://www.nytimes.com

GRAPHIC: Photo: Governor Jeb Bush of Florida faces a gubernatorial race this year, and so far, the Enron troubles have had little effect on his campaign. (Gary I. Rothstein)

Chart: "They Gave at the Office"
Here are some of the pension funds that invested in Enron stock and bonds and how much they lost.

Florida state board of administration
TOTAL LOST (IN MILLIONS): $335

University of California regents
TOTAL LOST (IN MILLIONS): 144

Georgia state pension fund
TOTAL LOST (IN MILLIONS): 127

Ohio state pension fund
TOTAL LOST (IN MILLIONS): 114

New York City pension fund
TOTAL LOST (IN MILLIONS): 109

Washington state employees
TOTAL LOST (IN MILLIONS): 103

Oregon state pension fund
TOTAL LOST (IN MILLIONS): 77

New Jersey state pension fund
TOTAL LOST (IN MILLIONS): 61

New York state pension fund
TOTAL LOST (IN MILLIONS): 58

California teachers
TOTAL LOST (IN MILLIONS): 49

Alabama retirement system
TOTAL LOST (IN MILLIONS): 47

California public employees
TOTAL LOST (IN MILLIONS): 40

Texas teachers retirement system
TOTAL LOST (IN MILLIONS): 36

Alaska state pension fund

TOTAL LOST (IN MILLIONS): 26

Texas employees retirement system
TOTAL LOST (IN MILLIONS): 24

Missouri public schools retirement system
TOTAL LOST (IN MILLIONS): 23

Nevada state pension fund
TOTAL LOST (IN MILLIONS): 22

Minnesota state pension fund
TOTAL LOST (IN MILLIONS): 20

Connecticut state pension fund
TOTAL LOST (IN MILLIONS) 15

Massachusetts state pension fund
TOTAL LOST (IN MILLIONS): 15

North Carolina pension fund for state and local employees
TOTAL LOST (IN MILLIONS): 15

Illinois teachers retirement fund
TOTAL LOST (IN MILLIONS): 14

Illinois state employees retirement system
TOTAL LOST (IN MILLIONS): 11-12

Los Angeles pension fund
TOTAL LOST (IN MILLIONS): 11

Missouri state pension fund
TOTAL LOST (IN MILLIONS): 9

Illinois universities retirement fund
TOTAL LOST (IN MILLIONS): 8

Rhode Island state pension fund
TOTAL LOST (IN MILLIONS): 5

South Carolina state pension fund
TOTAL LOST (IN MILLIONS): 4

Idaho state endowment fund
TOTAL LOST (IN MILLIONS): 4

Idaho state employees retirement fund
TOTAL LOST (IN MILLIONS): 2

San Francisco pension fund
TOTAL LOST (IN MILLIONS). 2

(Source: Published reports)

LOAD-DATE: January 27, 2002

Alliance Capital
Management Corporation
US Bank Place
601 Second Avenue South • Suite 5000
Minneapolis, Minnesota 55402-4322
Tel: (612) 332-1544
Fax (612) 673-8353

Alfred Harrison
Vice Chairman

December 5, 2001

AllianceCapital

Mr. Ken Manke
Florida State Board of Administration
Assistant Chief of Domestic Equities
P.O. Box 13300
Tallahassee, Florida 32317-3300

Dear Ken:

Enron was a company with a dominant (45%) position in the newly deregulated area of the wholesale gas and electricity trading market. In many respects Enron pioneered the on-line facilitation of the movement of these products in the U.S. and Europe. Indeed, as recently as last week, many business professors still praised the company's innovative vision (e.g. Financial Times, December 4, 2001).

Over the last year we met with the company in Alliance offices about ten times. As we were buying the stock the fundamental growth rate (20-25%) always seemed attractive in relation to a market where many growth stocks, especially in the technology field, were declining as their earnings fell.

As is obvious, analysts and portfolio managers must make the assumption that audited financial statements are not deficient through the non-disclosure of pertinent off balance sheet items and the details of private partnerships.

In mid-August Jeff Skilling, who had been appointed to take over as CEO after Ken Lay, resigned. This resignation was stated to be for personal reasons, and the company did not offer additional information.

Unfortunately from approximately that time forward previously undisclosed information has come to light as to possible contingent liabilities. Earnings for previous years have also been restated. We understand from news accounts that the Securities and Exchange Commission, the Department of Justices and the United States Congress also have questions about Enron's apparent non-disclosure of information.

Over the past few months, even as the share price declined, the basic business appeared to be unaffected and standing alone could more than justify the lower price of the stock.

In the last several weeks we met with management on several occasions, from both a stock and fixed income vantage point. However, subsequent to our meetings, the company continued to newly disclose negative information.

Even so, with the stock in continued decline, Dynegy probably the second largest entity in the field, offered a merger proposition that valued the company at $10-$15, depending on the price of Dynegy stock. Dynegy management traveled the country, including meeting with Alliance, stressing the great advantage of such a merger, and a number of analysts on the Street forecast a more than 50% one-year appreciation in the price of the "new" Dynegy being so created. Accordingly given the 30% arbitrage discount offered by owning the "new" Dynegy, the purchase of the depressed Enron stock made sense.

Dynegy withdrew this offer, however, when the ratings agencies downgraded Enron debt to junk status. I sold the stock on Friday, November 30th. The company went into Chapter 11 bankruptcy that weekend.

Kind regards,

Yours truly,

AH

Alfred Harrison

AH/mah

Enclosure

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